Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

SUNOCO, INC., SUN PIPE LINE COMPANY
and ATLANTIC PIPELINE CORP.,

Petitioners,

v.

STEVEN SEYMOUR, GERALDINE SEYMOUR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT, MIDDLE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED FOR REVIEW

Does a state fail to provide due process consistent with the Fourteenth Amendment when its standard of appellate review of jury awards of punitive damages requires only a determination of whether there may have been some evidentiary conflict and eschews an independent judicial determination whether the facts clearly and convincingly support the imposition of punitive damages?

Did the Pennsylvania Supreme Court deprive petitioner of due process consistent with the Fourteenth Amendment by summarily ordering the reinstatement of a jury's punitive damages award against petitioner without independently determining, as a matter of law, whether the evidence clearly and convincingly established that petitioner acted with the state of mind required for the imposition of punitive damages and without applying the state's traditional standard of strict judicial scrutiny of punitive damages awards that the intermediate appellate court applied to vacate the jury's punitive damages award?

LIST OF THE PARTIES AND CORPORATE DISCLOSURE STATEMENT

The respondents not listed in the caption are: Emma Nelson, Allen H. Nelson, Jennifer Coll, Mary Grochowski, Chester Grochowski, Nancie S. Grove, Sharon Monzo, David Monzo, Carol Anne Denaro, Charles Denaro, Deborah Poppert, Thomas J. Poppert, Helen Read, Harold Read, Bonnie Smith, Craig E. Smith, A. Thomas Stewart, Vera Williams, Robert Williams and Joseph and Jana Batchelder.

Sunoco, Inc. (formerly Sun Company, Inc.) has no parent company, but is the parent company of Sun Pipe Line Company and Atlantic Pipeline Corp. No publicly held company owns 10% or more of the stock of any petitioner.

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Sunoco, Inc., Sun Pipe Line Company and Atlantic Pipeline Corp. (the "Petitioner") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania, Middle District in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, Middle District, dated November 12, 1999, is reported at *Seymour v. Sun Company, Inc.*, 740 A.2d 1139 (Pa. 1999). (App. A). The opinions of the Superior Court of Pennsylvania (App. B) and the Court of Common Pleas of Delaware County (App. C) are both unreported.

STATEMENT OF JURISDICTION

Petitioner timely filed an application for reargument, which the lower court denied on January 28, 2000. (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]"

CONCISE STATEMENT OF THE CASE

Petitioner operates an interstate petroleum pipe line. When it was notified in 1989 that new homes would be built on property in the vicinity of a segment of its 40'-wide pipe

line right-of-way that ran near the properties owned by the respondents, petitioner met with the builder and its grading subcontractor, provided them with a map showing the existence and extent of the right-of-way, the path of the pipe line, and the above-ground markers for the pipeline. Petitioner also staked the exact course of the pipe line in the presence of the contractors, and provided them with the precise location of and the detailed specifications for the construction of an elevated crossing over the pipe line and with specific instructions to avoid damage to the pipe line. The contractors assured petitioner that only the demarcated crossing would be used in connection with the construction of the homes. As the construction progressed, petitioner maintained contact with the contractors, reminded them of the need to avoid damage to the pipe line, and received their assurances that the pipe line would not be damaged.

On November 5, 1990, a pilot conducting petitioner's routine aerial inspection of its pipe line right-of-way reported seeing a backhoe "east of the right-of-way" and a "dozer crossing right-of-way." Petitioner dispatched an experienced field inspector who was familiar with the pipe line and the construction project to investigate the pilot's report at the site. As with his previous inspections of the site, the inspector found no sign of any unauthorized crossing of the pipe line and no indication that the construction operations had deviated from their established plan.

By coincidence, in early November of 1990, petitioner began sophisticated tests of the integrity of its pipe lines that had been developed by a renowned expert in that field. Petitioner had voluntarily initiated those tests nearly a decade before, even though the federal standards for the operation

of interstate petroleum pipe lines did not require their use, both when petitioner adopted them and in 1990.

In the first phase of the tests, which began in early November of 1990, a device known as a "caliper pig" was run through the pipe line to determine whether the pipe line had sustained any significant mechanical damage from outside forces. The caliper pig found no mechanical damage to the pipe line in the vicinity of the housing construction.

On November 16, 1990, after petitioner had completed the "caliper pig" test, unbeknownst to the builder of the housing project and to petitioner, an employee of the builder's grading subcontractor trespassed the pipe line right-of-way while operating a steel-tracked front-end loader. The employee knew that he had traversed the pipe line in an unauthorized location. The employee and the grading subcontractor kept secret, and did not inform the builder or petitioner of the fact of the trespass nor the fact that the front-end loader had become mired in the mud and had spun its steel tracks atop the pipe line in the employee's and the subcontractor's efforts to extract the backhoe, thus damaging the pipe line, which ruptured at that point 15 months later.

Between November of 1990 and January of 1991, petitioner excavated, drained, inspected, and replaced, the numerous segments of its pipe line that the caliper pig test indicated as having mechanical damage. Petitioner then began the second phase of its pipe line tests. In that phase, a "smart pig" device was run through the length of the pipe line to measure, through the use of magnetic flux, the thickness of the pipe line so that petitioner could ascertain, pursuant to the standards developed under the aegis of the expert testing company, whether the pipe line had sustained

unacceptable corrosion damage. The smart pig test results, which petitioner received in late March of 1991, revealed no such corrosion damage in the vicinity of the housing construction.

Nearly a year later, the pipe line ruptured on March 4, 1992, causing only relatively slight contamination to a nearby stream and some tainting of the surfaces of respondents' properties. Petitioner responded swiftly to stop the leak, to repair and replace the damaged section of the pipe line, and to restore the properties.

At the subsequent trial of respondents' ensuing lawsuits against petitioner for compensatory and punitive damages, respondents' experts opined that the rupture occurred where the grading subcontractor's backhoe had struck the pipe line, and that the smart pig test results regarding corrosion to the pipe line could have been interpreted to reveal a need for further investigation of that portion of the pipe line for mechanical damage. Petitioner's expert, the noted inventor of the smart pig tests, testified that petitioner had no reason to know from the corrosion-oriented smart pig test results that the pipe line had sustained mechanical damage and would eventually rupture.

Over petitioner's strenuous objections, the trial judge allowed the jury to impose $1,000,000 in punitive damages on petitioner in addition to the $126,000 in compensatory damages that it awarded to the respondents. After the trial judge denied petitioner's motion for post-trial relief, petitioner appealed the judgments against it.

A three-judge panel of the Pennsylvania Superior Court considered the parties' briefs and oral arguments. On

June 1, 1998, the panel majority ruled, via an extensive, detailed, and factually accurate opinion, that the facts of record, even when viewed in the light most favorable to the respondents, did not legally warrant the imposition of punitive damages under the "reckless indifference" standard established by the Pennsylvania Supreme Court. The Superior Court then vacated the jury's award of punitive damages.

On respondents' appeal from the Superior Court's judgment, the Pennsylvania Supreme Court received the parties' briefs and heard their oral arguments on October 20, 1999. Less than one month later, on November 17, 1999, that court summarily reversed the judgment of the intermediate appellate court and remanded the case to the trial court for reinstatement of the jury's punitive damages award. The Pennsylvania Supreme Court rendered its decision via a two-sentence *per curiam* order without an opinion. That order states in full, "**AND NOW**, this 17th day of November, 1999, the Order of the Superior Court is REVERSED pursuant to *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996). The case is remanded to the trial court for reinstatement of the award of punitive damages."

Petitioner filed a timely application for reargument with the Pennsylvania Supreme Court. In that application, as well as in its briefs to that court, to the Pennsylvania Superior Court, and to the trial court, petitioner specifically underscored that review of jury punitive damages awards required the courts independently to determine, as a matter of law and as a matter of constitutional due process, whether or not the facts clearly and convincingly fulfilled Pennsylvania's exacting "reckless indifference" standard. (*See*, petitioner's Application for Reargument, pp. iv,

1-2, 4; petitioner's Pennsylvania Supreme Court Brief for Appellees, pp. 23-24; petitioner's Pennsylvania Superior Court Brief for Appellants, pp. 35-36; petitioner's post-trial motion brief, p. 12-13, n.3). Addressing the implication raised by Pennsylvania Supreme Court's citation of *Adamski* as the sole basis for its decision, petitioner's application for reargument delineated how the decision of the Pennsylvania Superior Court fully comported with that standard while the decision of the Pennsylvania Supreme Court completely departed from that standard and deprived petitioner of due process.

The Pennsylvania Supreme Court denied petitioner's application for reargument via the court's January 28, 2000 order. Petitioner now files this timely petition for writ of certiorari to review the decision of the Pennsylvania Supreme Court.

REASONS FOR GRANTING THE WRIT

Your Honorable Court should grant this petition and issue a writ of certiorari to review the decision of the Pennsylvania Supreme Court, because that decision deprived petitioner of the due process guaranteed by the Fourteenth Amendment.

In *Honda Motor Co., Inc. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg*"), your Honorable Court recognized that jury punitive damages awards pose an acute danger of arbitrary deprivation of property, 512 U.S. at 432, and that the clear and convincing standard is an important judicial due process check against an unwarranted imposition of punitive damages, 512 U.S. at 433. In that case, your Honorable Court also reiterated that a state's "abrogation of a well-established common-law protection against arbitrary deprivations of

property raises a presumption that its procedures violate the Due Process Clause," 512 U.S. at 430, and that your Court has not hesitated to find that judicial proceedings violate due process when they lack the traditional protections against arbitrary and inaccurate adjudications. *Id.*

This case presents precisely that type of situation, requiring the intervention of your Honorable Court unhesitatingly to find that the decision of the Pennsylvania Supreme Court deprives petitioner and other interstate and intrastate citizens sued for punitive damages in Pennsylvania of the most fundamental due process checks against the unwarranted imposition of punitive damages.

The Supreme Court of Pennsylvania has already abandoned the common law requirement that the amount of punitive damages be rationally related to the amount of compensatory damages awarded, *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (1989). Pennsylvania has thus eliminated from the consideration of its courts one of the essential tests established by your Honorable Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996),[1] for the judicial determination as to when punitive damages awards "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment," *Id.* at 568.[2]

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1. Your Honorable Court previously looked to the ratio between compensatory and punitive damage awards in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), and in *TXO Production Corp. v. Alliance Resources, Corp.*, 509 U.S. 443, 460 (1996).

2. The Court identified three "guideposts" as indicia of the reasonableness of a punitive damages award: "the degree of

(Cont'd)

The instant decision of the Pennsylvania Supreme Court further erodes the traditional safeguards against baseless punitive damages awards by summarily reversing the considered decision of an appellate court that applied the appropriate standards of appellate review, accurately reviewed the trial court record, and correctly determined that the undisputed facts did not establish that punitive damages were warranted as a matter of law.

In *Oberg*, your Honorable Court considered the effect, under the Due Process Clause of the Fourteenth Amendment, of Article VII (Amended), section 3, of the Oregon Constitution, which provided in pertinent part:

> In actions at law, where the value in controversy shall exceed $ 200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

The Oregon Supreme Court interpreted the effect of that provision as preventing any appellate examination of a jury's punitive damages award except where the appellate court found that the jury's verdict had no supporting evidence at all. Your Court held that "Oregon's denial of judicial review of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment," *Oberg*, *supra*, 512 U.S. at 432.

(Cont'd)
reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this [punitive] remedy and the civil penalties authorized or imposed in comparable cases," ***BMW***, *supra*, 571 U.S. at 574-75.

Your Honorable Court continued, stating,

> A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

Oberg, *supra*, 512 U.S. at 432.

On remand from your Honorable Court, the Oregon Supreme Court recognized that its "no evidence" standard was unconstitutional when applied to judicial review of jury punitive damages verdicts, *Oberg v. Honda Motor Co., Ltd.*, 888 P.2d 8, 10 (Ore. 1995) ("*Oberg II*") (footnotes omitted):

> Article VII (Amended), section 3, of the Oregon Constitution, quoted in note 2 ante, prohibits a court from reexamining a fact tried by a jury unless there is no evidence to support the jury's verdict. In *Van Lom v. Schneiderman*, 187 Ore. 89, 116, 210 P.2d 461 (1949), this court held that an assessment of punitive damages is a question of fact committed to the decision of a jury, to which Article VII (Amended), section 3, applies. Therefore, a trial or appellate court is prohibited from reviewing an award of punitive

> damages if there is evidence in the record to support a jury's finding that punitive damages should be awarded. *Id.* at 110-13. It is that aspect of the holding in *Van Lom*, construing Article VII (Amended), section 3, that comes into direct conflict with the decision of the Supreme Court of the United States in this case, concerning the requirements of federal due process. Under the Supremacy Clause, we are bound to follow the requirements of federal due process in the face of that conflict.

What the decision of the Pennsylvania Supreme Court reflects in this case is precisely what the Oregon Supreme Court correctly perceived was constitutionally wrong with its earlier decision. The decision of the Pennsylvania Supreme Court treats the jury's punitive damages verdict as merely the resolution of a pure question of fact that was essentially unreviewable, even as to whether the facts satisfied the legal standard for the imposition of punitive damages.

The decision of the Third Circuit in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), and its earlier decision in *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992), provide striking contrasts to the decision of the Pennsylvania Supreme Court in the instant case.

In *Inter Medical*, following a lengthy trial, a jury found for the plaintiff companies on all of the breach of contract and tort claims submitted to it and returned a verdict of $48,000,000 in compensatory damages and $100,600,000 in punitive damages. The trial court denied the defendants'

motions for judgment as a matter of law or for a new trial but reduced the award of punitive damages to $50,000,000. On appeal, the Court of Appeals further reduced the punitive damages award to $1,000,000. Rather than deferring to the jury or to the trial judge, the appellate court correctly recognized that its duty was to make an independent evaluation of the punitive damages award, using your Honorable Court's decision in *BMW* and a subsequent decision of the Tenth Circuit as the framework for its independent analysis of the punitive damages award. 181 F.3d at 467.

In *Keenan*, the court conducted an independent assessment of the evidence and reversed the punitive damages assessed against one of the defendants after finding that there was inadequate evidence to support their imposition, *Keenan*, *supra*, 983 F.2d at 471.

In stark contrast to *Inter Medical* and to *Keenan*, the decision of the Pennsylvania Supreme Court in this case reflects no independent analysis of the facts and no standard of review, except for the complete deference mandated by its earlier decision in *Adamski* for the factfinder's selection among the witnesses' varying versions of the basic events.

As the Third Circuit correctly noted in *Inter Medical*, "In punitive damages cases we must be informed by the Supreme Court's jurisprudence and, as noted above, that jurisprudence counsels intensive review". 181 F.3d at 470. The decision of the Pennsylvania Supreme Court in the instant case, however, reflects that it took no guidance from your Honorable Court and that it even departed from the common law standards that itself had previously articulated for judicial review of jury punitive damages verdicts.

Because punitive damages awards implicate the constitutional right to be free from property seizures that lack procedural or substantive due process, judicial review of those awards should be independent and plenary, much akin to the review of verdicts that reflect a jury's determination that the evidence established actual malice in a defamation case that implicates similar freedoms under the First Amendment. Such a review was endorsed and conducted by your Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659, 668-693 (1989). In that case the Court described its role as encompassing a full review of the factual record, granting deference to the factfinder on credibility determinations, but examining the facts and circumstances independently to see whether or not they fall within the constitutional protections, 491 U.S. at 688-689:

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose*, 466 U.S., at 499-500, the reviewing court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,' " *New York Times Co.*, 376 U.S., at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

The Pennsylvania Superior Court's majority opinion reflects that it conducted a comparable review. However,

the order of the Pennsylvania Supreme Court establishes that it did not conduct such a review. The failure of the Pennsylvania Supreme Court to provide petitioner with due process is evidenced in several ways.

First, the Pennsylvania Supreme Court's order provides no statement or analysis of the facts and it does not reflect an independent determination that the largely undisputed historical facts of the case, which are succinctly delineated in this petition's statement of the case, established that petitioner acted with the mental state necessary to warrant the imposition of punitive damages.

Second, as the sole basis for its decision to vacate the order of the intermediate appellate court and to reinstate the jury's punitive damages verdict, the Pennsylvania Supreme Court referred to its *Adamski* decision. *Adamski*, however, did not involve punitive damages. The sole issue in that case was whether the insured had impliedly given permission for another to use her car. From three different sets of historical facts, the trial judge selected the two that established the implied grant of permission. The Pennsylvania Superior Court made a different choice, and the Pennsylvania Supreme Court properly reversed, because the choice was one that the trial court alone could make.

Third, in contrast to *Adamski*, the historical facts of this case, when accurately recounted and tested under the standard for punitive damages that Pennsylvania adopted, are largely undisputed.[3] While there was a disagreement between the

3. Crucial facts recounted in the opinion of the trial judge and in the opinion of the dissenting Superior Court judge lacked support in the record. Moreover, those judges applied invalid standards regarding the type of conduct that must be established to impose punitive damages.

parties' respective experts as to whether or not petitioner, in retrospect, could have or should have been alerted by the results of its corrosion test to possible mechanical damage to the precise segment of the pipe line in question, the resolution of that question in favor of respondents does not resolve the legal question as to whether the facts establish the requisite pre-accident state of mind on the part of petitioner to justify the deprivation of petitioner's property and the future restraints imposed on its liberty through the penalty and deterrence of punitive damages.

Fourth, the undisputed historical facts do not show that petitioner acted with the state of mind that would justify the jury's punitive damages award.

Under the applicable law of Pennsylvania, punitive damages could be imposed only in the "most circumscribed situations," *Smith v. Celotex Corp.*, 564 A.2d 209 (Pa. Super. 1989), that require proof of more than negligence or even gross negligence. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985); *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 704-5 (Pa. 1991); *Burke v. Maasen*, 904 F.2d 178, 182 (3d Cir. 1990).

Petitioner's pre-accident state of mind, *Smith*, *supra*; *Banas v. Matthews Int'l. Corp.*, 502 A.2d 637, 642-3 (Pa. Super. 1985) was a vital factor in determining whether, considering all of the circumstances and the relations of the parties, petitioner's failure to act was intentional, reckless, or malicious. *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963); *Feld v. Merriam*, 485 A.2d 742, 747-8 (Pa. 1984); *Martin*, *supra*, 494 A.2d at 1097, n.12.

Neither the respondents nor the lower courts charged petitioner with intentional or malicious conduct. In order to establish that petitioner's conduct was "reckless," respondents had to prove that petitioner "kn[ew], or ha[d] reason to know, . . . of facts which create[d] a high degree of risk of physical harm to another, and deliberately proceed[ed] to act, or fail[ed] to act, in *conscious* disregard of, or indifference to, that risk". *Restatement of Torts (Second)*, § 500, Comment a; *Martin*, *supra*, 494 A.2d at 1097-8.

The historical facts of this case may support the conclusion that petitioner may have been negligent, a conclusion that can be drawn from a post-accident retrospective view. Those facts, however, viewed from petitioner's pre-accident perspective, do not show that, before the accident occurred, petitioner knew or even had reason to know of the hidden damage inflicted by the subcontractor's secretive trespass onto the pipe line, and that petitioner consciously or deliberately chose to allow the pipe line to rupture. In short, the facts of this case do not justify the punitive damages that the Pennsylvania Supreme Court reinstated without a hint of the due process analysis required by the Fourteenth Amendment, or even the "strict judicial controls" mentioned without elaboration by the court in *Martin*, *supra*, 494 A.2d at 1096.

Petitioner recognizes that in footnote 11 of the Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. - 1, 23 (1991), the majority noted that "[t]here is much to be said in favor of a State's requiring, as many do, *see, e.g.*, Ohio Rev. Code Ann. § 2307.80 (Supp. 1989), a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' see Colo. Rev. Stat. § 13-25-127(2)

(1987), as in the criminal context," and stated that it was "not persuaded, however, that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama — 'reasonably satisfied from the evidence' — when buttressed, as it is, by the procedural and substantive protections outlined above, is constitutionally sufficient." Petitioner respectfully submits, however, that a comparison of the Alabama standards and procedures with those of Pennsylvania reflected in this case demonstrates that the Pennsylvania standards and procedures fall far below those of Alabama and those required to ensure that jury punitive damages awards do not violate the process that is due under the Fourteenth Amendment.

Like the Alabama Supreme Court, but unlike many other states, the Pennsylvania Supreme Court does not demand "clear and convincing" proof to establish a punitive damages verdict in cases such as this case. *Martin*, *supra*, 494 A.2d 1098; *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 750 (3d Cir. 1994).[4] Unlike the Alabama Supreme Court, however, the Pennsylvania Supreme Court has not fashioned the procedural and substantive protections created by the Alabama Supreme Court, and outlined by your Court in *Haslip*, *supra*, 499 U.S. at 19-23, to buttress Pennsylvania's low level of proof to make it constitutionally sufficient.

Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law in *Haslip*, 499

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4. The Third Circuit, interestingly, applies the "clear and convincing" standard to its evaluation of punitive damages verdicts, at least in cases involving Virgin Islands law, *see Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983); *Dunn v. The Litwin Corp.*, 1 F.3d 1371, 1374 (3d Cir. 1993).

U.S. at 19. However, in accord with Pennsylvania law, evidence of petitioner's wealth was submitted to the jury in this case. *See, e.g., Sprague v. Walter*, 656 A.2d 890, 920 (Pa. Super. 1995) ("It is well-settled that when punitive damages are at issue in a case, the jury must consider not only the character of the act underlying the claim and the harm suffered by the plaintiff, but also the wealth of the defendant.") (citations to *Kirkbride* and to *Feld* omitted). Unlike the Alabama Supreme Court, the Pennsylvania Supreme Court in this case did not follow its own guidance to its lower courts on the restraints and tests to be followed and delineated in examining punitive damages awards.

While the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion, by first undertaking a comparative analysis, 499 U.S. at 20-21, the Pennsylvania Supreme Court, as previously noted, requires no relationship between compensatory and punitive damages awards. Moreover, while the Alabama Supreme Court makes an independent application of the detailed substantive standards it has developed for evaluating punitive awards, 499 U.S. at 21, the Pennsylvania Supreme Court made no such analysis in this case.[5]

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5. On the question of excessiveness, Pennsylvania's approach is akin to the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). *See, e.g., Sprague, supra*, 656 A.2d at 925 ("The excessiveness of punitive damages in a case in which they are allowable may be grounds for reversal, for a new trial, or for a remittitur under the usual rules by which the courts control the jury's award of compensatory damages.").

CONCLUSION

Because the Pennsylvania Supreme Court manifestly failed to afford petitioner the due process guaranteed by the Fourteenth Amendment, petitioner respectfully requests that your Honorable Court grant this petition and issue a writ of certiorari to review the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED AND DECIDED NOVEMBER 17, 1999 AND ENTERED NOVEMBER 19, 1999

[J-213-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 55 And 56 M.D. Appeal Dockets 1999

STEVEN SEYMOUR AND GERALDINE SEYMOUR, H/W, ET AL

v.

SUN COMPANY, INC. ET AL

APPEAL OF: STEVEN SEYMOUR AND GERALDINE SEYMOUR, H/W, EMMA NELSON, ALLEN H. NELSON, JENNIFER COLL, MARY GROCHOWSKI, CHESTER GROCHOWSKI, NANCIE S. GROVE, SHARON MONZO, DAVID MONZO, CAROL ANNE DENARO, CHARLES DENARO, DEBORAH POPPERT, THOMAS J. POPPERT, HELEN READ, HAROLD READ, BONNIE SMITH, CRAIG E. SMITH, A. THOMAS STEWART, VERA WILLIAMS AND ROBERT WILLIAMS (at 55 M.D. Appeal Docket, 1999)

APPEAL OF: JOSEPH AND JANA BATCHELDER (AT 56 M.D. Appeal Docket, 1999)

Appeals from the Order of the Superior Court entered June 1, 1998, at No. 2295 PHL 95, vacating the order of

Appendix A

the Court of Common Pleas of Delaware County, Civil Division entered May 22, 1995 at Nos. 92-003598, 92-006131, 93-16345, 93-18844 and 94-29.

ARGUED: OCTOBER 20, 1999

ORDER

PER CURIAM: **DECIDED: November 17, 1999**

AND NOW, this 17th day of November, 1999, the Order of the Superior Court is REVERSED pursuant to *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996). The case is remanded to the trial court for reinstatement of the award of punitive damages.

JUDGMENT ENTERED:
November 19, 1999

s/ Shirley Bailey
Shirley Bailey,
Chief Clerk

APPENDIX B — MEMORANDUM AND JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED JUNE 1, 1998

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2295 PHILADELPHIA 1995

STEVEN SEYMOUR AND
GERALDINE SEYMOUR, H/W

v.

SUN COMPANY, INC., SUN PIPE LINE COMPANY
AND SUN REFINING AND MARKETING CO.,

v.

JOSEPH NORCINI & SONS, INC.,

SUN PIPE LINE COMPANY

v.

REWIS & DAMBLY CONSTRUCTION, INC., AND
REWIS & DAMBLY DEVELOPMENT, INC.

v.

JOSEPH NORCINI & SONS, INC.,

JOSEPH BATCHELDER AND JANA BATCHELDER

v.

SUN PIPE LINE COMPANY

Appendix B

NANCIE GROVE

v.

SUN COMPANY, INC., SUN PIPE LINE COMPANY AND SUN REFINING AND MARKETING COMPANY, ATLANTIC PIPELINE CORP., REWIS & DAMBLY CONSTRUCTION INC., AND REWIS & DAMBLY DEVELOPMENT INC., AND JOSEPH NORCINI & SONS, INC.,

---

JOSEPH BATCHELDER AND JANA BATCHELDER

v.

ATLANTIC PIPELINE CORP., REWIS & DAMBLY CONSTRUCTION INC., AND REWIS & DAMBLY DEVELOPMENT, INC.,

APPEAL OF: SUN PIPE LINE COMPANY, SUN COMPANY, INC., SUN COMPANY, INC. (R&M), FORMERLY SUN REFINING AND MARKETING COMPANY, AND ATLANTIC PIPELINE COMPANY

Appeal from the Judgment entered May 25, 1995 in the Court of Common Pleas of Delaware County, Civil Division, at No. 92-003598, 92-006131, 93-16345, 93-18844 & 94-29.

BEFORE: McEWEN, P.J., DEL SOLE, and HOFFMAN, JJ.

Appendix B

MEMORANDUM:

This is an appeal from a judgment entered against Joseph Norcini & Sons, Inc. ("Norcini") and Appellants Sun Company, Inc., Sun Pipeline Co., Sun Refining and Marketing Co., and Atlantic Pipeline Corp. (collectively referred to as, "Sun").[1] The facts as summarized by the trial court are as follows:

> A Sun pipeline burst and discharged approximately forty thousand (40,000) gallons of petroleum product onto realty in Edgmont Township and into the Chester Creek in Delaware County, Pennsylvania, on March 4, 1992 [footnote omitted] (9/14/94 N.T. 168; 9/26/94 N.T. 68-69; 9/29/94 N.T. 167). Defendants, Rewis & Dambly Development, Inc. (hereinafter, "R & D"), were the owners and developers of a residential project, known as "Shepherd Lane", in the area of this spill. (9/14/94 N.T. 253-255). R & D subcontracted with defendant, Joseph Norcini & Sons, Inc. (hereinafter "Norcini") to excavate water retention basins and to repave the roadway running through the development. (9/14/94 N.T. 257). Plaintiffs are owners or the occupiers of land affected by the spill and they alleged injuries to their health, real property and business, for which they sought compensatory and punitive damages. [footnote omitted].

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1. Norcini is not a party to the present appeal.

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The Sun pipeline transmits various types of petroleum product, with varying degrees of volatility, through pipelines running between Philadelphia and Reading, Pennsylvania. These lines run beneath the property owned by Plaintiffs Batchelder. An employee of Norcini, Jerry Dement, on November 16, 1990, was operating a seventeen-ton Caterpillar front end loader at the Shepherd Lane project and attempted to cross the buried pipeline's right of way. According to Mr. Dement, the crossing was being attempted in order to move the piece of equipment from one portion of his job assignment to another. (9/20/94 N.T. 106). The front end loader became mired in a streambed covering the pipeline. The efforts to extricate the equipment only caused its treads to dig deeper, ultimately to or near the level of the pipeline which was buried approximately three (3) feet below the surface. The rotating tread gouged the pipeline, causing the rupture some sixteen (16) months later. Sun agrees that the rupture was caused by the damage to the pipeline from Mr. Dement's equipment. (9/13/94 N.T. 177; 9/21/94 N.T. 90). Norcini agrees that their operator, Mr. Dement, was careless in crossing the pipeline and "obviously was wrong." (9/20/94 N.T. 89, 105).

Twenty-three Plaintiffs initiated this suit against Sun for personal injuries and property damage. Sun then joined R & D as an additional defendant, seeking contribution for damage to its pipeline

and remediation costs. The Plaintiffs Batchelder, owners of the land on which the burst occurred, sued R & D and Norcini for negligence, and Atlantic and Sun for breach of contract, negligence, and violation of the federal Oil Pollution Liability and Compensation Act, 33 U.S.C. §§2701 et sequitur. R & D sued the Plaintiffs Batchelder and its own subcontractors, including Norcini, for contribution and indemnity.

The jury found the Defendants Sun and Norcini liable. It found R & D not liable. It awarded Plaintiffs a combined total of Sixty-eight Thousand Dollars ($68,000.00). (10/13/94 N.T. 23-42). The Plaintiffs Batchelder were awarded compensatory damages in the amount of Fifty Thousand Dollars ($50,000.00) for breach of contract and Eight Thousand Dollars ($8,000.00) under the Oil Pollution Liability and Compensation Act. (10/3/94 N.T. 34-35). A total of One Million Dollars ($1,000,000.00) was awarded to the Plaintiffs in punitive damages against the Sun Defendants, with half that amount going to the Batchelders. (10/3/94 N.T. 23-33, 34).

Opinion at 2-4.

Sun's post-trial motions were denied and this appeal followed.

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Sun raises the following issues for our review:

1. Did the lower court err in denying defendants' motions for non-suit, directed verdict and judgment notwithstanding the verdict on the issue of punitive damages because the evidence, even when viewed in the light most favorable to the plaintiffs, did not clearly and convincingly establish the requisite state of mind necessary to impose punitive damages on the defendants under existing Pennsylvania law?

2. Did the lower court err when it denied defendants' motions for directed verdict and judgment notwithstanding the verdict against defendant developer on the issue of liability under Sections 416 and 427 of Restatement (Second) of Torts when the work of the developer's subcontractor created a special danger or peculiar risk as a matter of law and the subcontractor admitted negligence in failing to take the necessary precautions?

3. Did the lower court commit legal error when, over the timely objections of the defendants, it structured the jury interrogatories to condition recovery under Sections 416 and 427 of Restatement (Second) of Torts on recovery pursuant to a separate and distinct theory of liability under Restatement (Second) of Torts?

Sun's brief at p. 5.

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Sun's first argument is that the trial court erred in failing to grant a judgment notwithstanding the verdict on Appellees' claims for punitive damages. When reviewing a refusal to grant a judgment n.o.v. we must determine "whether when reading the record in the light most favorable to the verdict winner and granting every favorable inference therefrom, there was sufficient competent evidence to sustain the verdict." *Adamski v. Miller*, 545 Pa. 316, 319, 681 A.2d 171, 173 (1996), (citing *Wenrick v. Scloemann-Siemag Aktiengesellschaft*, 523 Pa. 1, 4, 564 A.2d 1244, 1246 (1989)).

Sun claims the trial court erred in failing to grant a judgment n.o.v. where the evidence failed to show that it had the requisite state of mind to support an award of punitive damages. Section 908(2) of the Restatement (Second) of Torts which provides for the imposition of punitive damages, was adopted by our Pennsylvania Supreme Court in *Feld v. Merriam*, 506 Pa. 383, 584 A.2d 742 (1984) and reads as follows:

> Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider that character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Recognizing the importance of the state of the mind of the actor, our supreme court wrote in *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088 (1935), that,

"[u]nder Pennsylvania law, only the first type of reckless conduct described in comment "a" to Section 500 [of the Restatement (Second) of Torts] is sufficient to create a jury question on the issue of punitive damages." Subsection 1 of comment "a" of Section 500 describes reckless conduct as that "where the "actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk." "Thus, 'punitive damages' are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." *Martin v. Johns-Manville*, 508 Pa. 154, 494 A.2d 1088, 1097 (1985) (citing *Chambers v. Montgomery*, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963) (quoting comment b to Section 908[1] of the Restatement of Torts)).

The trial court held that, "Sun's failure to more regularly inspect, to be aware of and act upon the information available to it, and to more carefully guard against damage to the line, was a substantial factor in causing the rupture and certainly, in light of the risk of transporting such hazardous liquids, constitutes recklessness." Opinion at 14.

Appellant argues the trial court's holding was erroneous because "even when viewed in the light most favorable to the plaintiffs, [the evidence] fails to prove that Sun Pipe Line knew or had reason to know of facts which created a high degree of risk of serious physical harm to the plaintiffs, and deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to that risk." Appellant's Brief at 41.

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The record shows that beginning in June 1989, a year before the excavation and construction work on the subject property commenced, Sun and R&D engaged in a series of correspondence during which Sun was made aware of the proposed construction and R&D's construction engineers were informed of Sun's established procedures and the location, depths and heights of the pipelines within the subject area. In addition, R&D was instructed to create a four-feet cover over the pipeline for a proposed road crossing. Sun made it clear that R&D was not permitted to allow any heavy machinery to pass over the pipeline at any location other than the finished road. (N.T. 6/19/94 at 9-15).

On November 5, 1990, following a routine aerial inspection of the site, a Sun inspector indicated in his report that a backhoe was spotted "east of the right of way" and a "dozer [was] crossing the right of way". As a result, on the following morning, a Sun employee inspected the site and reported that no equipment was located on Sun's right of way.

On November 16, 1990, Norcini employee, Jerry Dement, drove a front-end loader in an unauthorized area, drove over the pipeline's right of way and became stuck in a streambed. Efforts to free the front-end loader caused it to dig its treads deeper beneath the surface resulting in damage to the pipeline and causing its eventual rupture one and a half years later on March 4, 1992. Norcini never notified Sun or Appellees about what had occurred.

Earlier that November, prior to the front-end loader incident, Sun conducted a "caliper pig" test on a 60-mile

segment of the pipeline, including the area in question, which showed that there were no dents in the area where the leak later occurred.[2] (N.T. 9/16/94 at 62, 9/19/94 at 152-153). In January of 1991, a "smart pig"[3] test was run on the pipeline and those results were received by Sun from British Gas in March 1991.[4] The "smart pig" test showed metal loss in the area of the eventual leak, but because that loss did not exceed 70% penetration and Sun's established criteria provided that only those areas which "exceed 70% penetration were to be excavated for evaluation and possible repair", no further inspection of the area was conducted. (N.T. 9/19/97 at 155). The two Sun employees responsible for analyzing the results of the "smart pig" test testified that the damage to the line was caused by corrosion and that the test did not indicate any damage from an outside force. (N.T. 9/16/94 at 64, 9/19/97 at 159-163). Appellees' expert testified that because the data from the "smart pig" test indicated that, "throughout the region in question, the loss in metal thickness are between 30 and 70 percent — anywhere from three to seven times that required for replacement or gouging or denting," the results implied that the metal loss was due to gouging or denting rather than corrosion and at the very least, Sun should have excavated the area. (N.T. 9/14/94 at 56).

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2. A "caliper pig" test determines whether there are any dents in the pipeline. See N.T. at 9/16/94 at 61.

3. The purpose of a "smart pig" test is to "locate and quantify the extent of corrosion on the line." (N.T. 9/16/97 at 64-65).

4. The smart pig test was not run until January because dents detected by the caliper pig test which could have impaired passage of the smart pig through the lines had to first be repaired. (N.T. 9/19/94 at 153).

The trial court held this evidence supported the jury's award of punitive damages.

> It was evident that Sun's employees did not communicate between departments so as to obtain some collective understanding of all of the information that was available to it and, in fact, within the Sun Company. It is apparent that the pipeline was damaged by the metal treads on Norcini's front end loader and inexorably this damage led to the inevitable pipe rupture, which occurred in March of 1992. The risk of that rupture was substantially increased by that damage and Sun, although having available the "smart pig" test reports, failed to undertake any investigatory steps. Sun had within its hands not only the caliper and "smart pig" test reports, but also information about the construction, the equipment being used and aerial reports, all supplemented by a knowledge of the "common carrier" nature of this pipeline, years of experience and use of this pipeline. Sun's suggestion that the "smart pig" was not developed for the purpose of uncovering repairable damage to a pipeline is irrelevant, since it is clear that the tests very effectively identify damage and its location, thereby minimizing the expenditure necessary for repair and prevention. Sun certainly had the capability to accomplish those tasks.
>
> Support for the requisite recklessness can be found in the evidence that: Sun assumed from the

> test reports that there was an acceptable level of corrosion undeserving of repair. Sun assumed there was no external damage based on the caliper pig test that had been performed before the pipeline was damaged; Sun conducted no further caliper pig tests; Sun assumed the developers would follow Sun's procedures concerning the right of way in spite of aerial reports; Sun visited the construction site when no equipment was operating and workers were absent without follow up; and Sun did nothing to follow up the "smart pig" test reports indicating external damage to the pipeline in the area of the eventual rupture. Although Sun had the resources and talent to inspect, analyze and react to such problems, it did nothing as regard [sic] this damage. Only the serendipity that this line carried oil instead of gasoline prevented a broader catastrophe.

Trial Court Opinion at 12-13.

We disagree with the trial court's conclusion that there was sufficient evidence to support the jury's finding that Sun's actions rose to the level of recklessness. Sun followed its established procedures. It communicated its restrictions to R&D and inspected the site on several occasions. At no time was Sun aware that the pipeline had been hit by the front-end loader, yet, in an effort to maintain the integrity of the pipeline, Sun engaged in a "smart pig" test and carefully analyzed the data received therefrom. Accordingly, we hold that there was not an adequate evidentiary basis to support the trial court's finding that Sun was so recklessly indifferent

to Appellees' rights warranting an award of punitive damages.

In its remaining arguments, Sun asserts that the trial court erred in falling to rule as a matter of law that R&D was vicariously liable for Norcini's negligence and that the sequence in which the trial court submitted the special interrogatories to the jury concerning R&D's liability confused the jury. These issues were adequately addressed by the trial court in its Opinion authored by the Honorable Clement J. McGovern and, therefore, we adopt the court's reasoning as it relates to those issues.

Accordingly, because we hold that the trial court erred in failing to grant Sun a judgment n.o.v. with respect to punitive damages we vacate the award of punitive damages only.

President Judge McEwen concurs in the result.

Judge Hoffman files a dissenting memorandum.

* * *

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DISSENTING MEMORANDUM BY HOFFMAN, J.:

I must respectfully dissent. The majority concludes that the evidence was insufficient to support the jury's finding that appellant Sun's ("Sun") actions rose to the level of recklessness and vacates the jury's award of punitive damages. However, after reviewing the record under our standard of review, I believe that there was sufficient evidence for the jury to conclude that Sun engaged in reckless conduct and therefore would affirm the award of punitive damages.

The proper scope of review for an appellate court examining a denial of judgment notwithstanding the verdict (JNOV), is whether, reading the record in a light most favorable to the verdict winner and granting him or her the benefit of every favorable inference, there is sufficient competent evidence to support the verdict. ***Wenrick v. Schloemann-Siemag Aktienglesellschaft***, 523 Pa. 1, 4, 564 A.2d 1244 (1989).

Punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. ***SHV Coal, Inc. v. Continental Grain Co.***, 526 Pa. 489, 493, 587 A.2d 702, 704 (1991). "The determination of whether a person's actions arise to outrageous conduct lies within the sound discretion of the factfinder and will not be disturbed by an appellate court so long as that discretion has not been abused." ***Id.*** at 495, 587 A.2d at 705.

In Pennsylvania, conduct that is outrageous because of a defendant's reckless indifference to the rights of others

may permit an award of punitive damages. ***Id.*** at 493, 587 A.2d at 704 (citing Restatement (Second) of Torts § 908(2)). However, only reckless conduct reflecting a mental state where the "actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk" is sufficient to create a jury question on the issue of punitive damages. ***Id.*** at 704-705 (quoting ***Martin v. Johns-Mansville Corp.***, 508 Pa. 154, 170-173, 494 A.2d 1088, 1097-1098 (1985)). When punitive damages are at issue in a case, the jury must consider the character of the act underlying the claim, the harm suffered by the plaintiff, and the wealth of the defendant. ***Sprague v. Walter***, 656 A.2d 890, 920 (Pa. Super. 1995).

After considering the evidence presented at trial, the jury awarded appellees punitive damages in the amount of $500,000. The trial court refused to vacate the award, finding that "Sun's failure to more regularly inspect, to be aware of and act upon the information available to it, and to more carefully guard against damage to the line, was a substantial factor in causing the rupture and certainly, in light of the risk of transporting such hazardous liquids, constitutes recklessness." Trial Court Opinion at 14.

Here, the evidence showed that in October of 1990, a Sun internal memorandum reflected an associate senior pipeline engineer's expression of concern over heavy equipment crossing the pipeline at the Shepard Lane site. N.T. 9/19/94 at 46-48; Trial Exhibit PB-12. In November of

1990, a caliper pig[1] test was run on the Sun pipeline and revealed no dents in the area of the eventual leak. However, this test may have been run prior to the gouging of the pipeline by Norcini's employee. On November 16, 1990, Norcini's front-end loader damaged the pipeline. In January of 1991, a smart pig[2] test was run on the pipeline, the results of which were received by Sun sometime in late March or early April of 1991. The smart pig test revealed a metal loss of 50-70% in the area of the pipeline's eventual leak, a level that could have impaired the pipeline's integrity.[3] Sun's employees reviewed the smart pig test results but did no further inspection of the eventual burst point, because a computer "sort" of the smart pig results did not show that point as meeting their criteria for further inspection.[4] However, appellees' expert testified that Sun possessed information which "very probably" indicated that the pipeline's metal loss was due to mechanical gouging and denting, which required an excavation to inspect the area in question. N.T. 9/14/94 at 56.

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1. A caliper pig test is a test designed to detect any dents that may exist in the pipeline.

2. A smart pig test is a procedure which detects areas of metal loss within the pipeline wall itself.

3. Sun asserts that the smart pig test results gave them no indication as to whether the metal loss was caused by mere corrosion or by some outside force. ***See*** N.T. 9/16/94 at 66-67.

4. Sun's standard for excavation and repair of a pipeline piece was a metal loss exceeding 70%. N.T. 9/19/94 at 155.

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I believe that there is sufficient competent evidence to uphold the award of punitive damages. After receiving reports that heavy equipment had crossed the pipeline at the Shepard Lane site, an associate pipeline engineer expressed concern in a memorandum that the pipeline may have been damaged. The company then received test results that revealed extensive metal loss in the area of Shepard Lane, the same area where the pipeline engineer was concerned about damage from heavy machinery. Moreover, the pipeline carried petroleum products that presented an enormous risk to the property and the population in the areas surrounding the pipeline. Furthermore, an expert testified that, given the information Sun possessed about the pipeline at the Shepard Lane cite, Sun should have investigated whether the pipeline needed repair. Despite the obvious warning signs that the pipeline suffered damage at the Shepard Lane site, Sun did not bother to send engineers to the Shepard Lane site to inspect the section of pipeline. Accordingly, I believe that Sun had reason to know of a high degree of risk to the property surrounding the pipeline and consciously disregarded this risk by failing to take affirmative steps to investigate and remedy the pipeline. Certainly, viewing this evidence in the light most favorable to appellees and considering the risk involved in transporting hazardous materials, the jury's award of punitive damages was proper.

Therefore, I dissent from the majority's conclusion that the award of punitive damages should be vacated, and I would affirm the trial court's decision.

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IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2295 PHILADELPHIA 1995

STEVEN SEYMOUR AND
GERALDINE SEYMOUR, H/W

v.

SUN COMPANY, INC., SUN PIPE LINE COMPANY
AND SUN REFINING AND MARKETING CO.,

v.

JOSEPH NORCINI & SONS, INC.,

SUN PIPE LINE COMPANY

v.

REWIS & DAMBLY CONSTRUCTION, INC., AND
REWIS & DAMBLY DEVELOPMENT, INC.

v.

JOSEPH NORCINI & SONS, INC.,

JOSEPH BATCHELDER AND JANA BATCHELDER

v.

SUN PIPE LINE COMPANY

Appendix B

NANCIE GROVE

v.

SUN COMPANY, INC., SUN PIPE LINE COMPANY AND SUN REFINING AND MARKETING COMPANY, ATLANTIC PIPELINE CORP., REWIS & DAMBLY CONSTRUCTION INC., AND REWIS & DAMBLY DEVELOPMENT INC., AND JOSEPH NORCINI & SONS, INC.,

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JOSEPH BATCHELDER AND JANA BATCHELDER

v.

ATLANTIC PIPELINE CORP., REWIS & DAMBLY CONSTRUCTION INC., AND REWIS & DAMBLY DEVELOPMENT, INC.,

APPEAL OF: SUN PIPE LINE COMPANY, SUN COMPANY, INC., SUN COMPANY, INC. (R&M), FORMERLY SUN REFINING AND MARKETING COMPANY, AND ATLANTIC PIPELINE COMPANY

Appeal from the Judgment entered May 25, 1995 in the Court of Common Pleas of Delaware County, Civil Division, at No. 92-003598, 92-006131, 93-16345, 93-18844 & 94-29.

BEFORE: McEWEN, P.J., DEL SOLE, and HOFFMAN, JJ.

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JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE *County be, and the same is hereby* VACATED THE AWARD OF PUNITIVE DAMAGES ONLY.

BY THE COURT:

s/ [illegible]

DATED: JUNE 1, 1998. *PROTHONOTARY*

APPENDIX C — OPINION OF THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA DATED AND FILED JULY 2, 1996

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION — LAW

NO. 92-3598

STEVEN SEYMOUR and GERALDINE SEYMOUR, h/w, et al.

v.

SUN COMPANY, INC., SUN PIPE LINE and SUN REFINING AND MARKETING COMPANY

NO. 92-6131

SUN PIPE LINE COMPANY

v.

REWIS & DAMBLY CONSTRUCTION, INC. and REWIS & DAMBLY DEVELOPMENT, INC.

Defendant

and

JOSEPH NORCINI & SONS, INC.

Additional Defendant

Appendix C

NO. 93-16345

JOSEPH BATCHELDER and JANA BATCHELDER

v.

SUN PIPE LINE COMPANY

NO. 93-18844

NANCIE GROVE

v.

SUN COMPANY, INC., ET AL.

NO. 94-29

JOSEPH BATCHELDER and JANA BATCHELDER

v.

ATLANTIC PIPELINE CORP., ET AL.

* * *

OPINION

McGOVERN, J. FILED: 7/2/96

Defendants, Sun Company, Inc., Sun Pipe Line Company, Sun Refining and Marketing Company, and

Appendix C

Atlantic Pipeline Corporation (hereinafter "Sun") appeal from the denial of Post-Trial Motions in the above-captioned matters which were consolidated for discovery and trial.

A Sun pipeline burst and discharged approximately forty thousand (40,000) gallons of petroleum product onto realty in Edgmont Township and into the Chester Creek in Delaware County, Pennsylvania, on March 4, 1992[1] (9/14/94 N.T. 168; 9/26/94 N.T. 68-69; 9/29/94 N.T. 167). Defendants, Rewis & Dambly Construction, Inc. and Rewis & Dambly Development, Inc. (hereinafter "R & D"), were the owners and developers of a residential project, known as "Shepherd Lane", in the area of this spill. (9/14/94 N.T. 253-255). R & D subcontracted with Defendant, Joseph Norcini & Sons, Inc. (hereinafter "Norcini") to excavate water retention basins and to repave the roadway running through the development. (9/14/94 N.T. 257). Plaintiffs are owners or the occupiers of land affected by the spill and they alleged injuries to their health, real property and business, for which they sought compensatory and punitive damages.[2]

The Sun pipeline transmits various types of petroleum product, with varying degrees of volatility, through pipelines running between Philadelphia and Reading, Pennsylvania. These lines run beneath the property owned by Plaintiffs Batchelder. An employee of Norcini, Jerry Dement, on

1. The area has been governmentally designated as environmentally sensitive wetlands. (9/29/94 N.T. 56-57).

2. Plaintiff, Sun Pipeline Company, in civil action No. 92-6131 is suing R & D and Norcini for damages arising from this same incident.

November 16, 1990, was operating a seventeen-ton Caterpillar front end loader at the Shepherd Lane project and attempted to cross the buried pipeline's right-of-way. According to Mr. Dement, the crossing was being attempted in order to move the piece of equipment from one portion of his job assignment to another. (9/20/94 N.T. 106). The front end loader became mired in a streambed covering the pipeline. The efforts to extricate the equipment only caused its treads to dig deeper, ultimately to or near the level of the pipeline which was buried approximately three (3) feet below the surface. The rotating tread gouged the pipeline, causing the rupture some sixteen (16) months later. Sun agrees that the rupture was caused by the damage to the pipeline from Mr. Dement's equipment. (9/13/94 N.T. 177; 9/21/94 N.T. 90). Norcini agrees that their operator, Mr. Dement, was careless in crossing the pipeline and "obviously was wrong." (9/20/94 N.T. 89, 105).

Twenty-three Plaintiffs initiated suit against Sun for personal injuries and property damage. Sun then joined R & D as an additional Defendant, seeking contribution for damage to its pipeline and remediation costs. The Plaintiffs Batchelder, owners of the land on which the burst occurred, sued R & D and Norcini for negligence, and Atlantic and Sun for breach of contract, negligence, and violation of the federal Oil Pollution Liability and Compensation Act, 33 U.S.C. §§2701 et sequitur. R & D sued the Plaintiffs Batchelder and its own subcontractors, including Norcini, for contribution and indemnity.

The jury found the Defendants Sun and Norcini liable. It found R & D not liable. It awarded Plaintiffs a combined

total of Sixty-eight Thousand Dollars ($68,000.00). (10/3/94 N.T. 23-42). The Plaintiffs Batchelder were awarded compensatory damages in the amount of Fifty Thousand Dollars ($50,000.00) for breach of contract and Eight Thousand Dollars ($8,000.00) under the Oil Pollution Liability and Compensation Act. (10/3/94 N.T. 34-35). A total of One Million Dollars ($1,000,000.00) was awarded to the Plaintiffs in punitive damages against the Sun Defendants, with half that amount going to the Batchelders. (10/3/94 N.T. 23-33, 34).

Defendant Sun's Post-Trial Motions were denied. This appeal followed.

I. ISSUES WAIVED

Defendant Sun filed a Concise Statement of Matters Complained of on Appeal pursuant to *Pennsylvania Rule of Appellate Procedure* 1925(b), suggesting that it was "an example of, but not limited to," matters complained of on appeal. It is this Court's opinion that such is not in keeping with the spirit or the letter of that Rule. The Defendant Sun is thus precluded from raising new matters on appeal, since the Trial Court has been precluded from addressing them. *Elmwood Federal Savings Bank v. Parker*, 666 A.2d 721 (Pa. Super. 1995); *Taylor v. Owens-Corning Fiberglass Corp.*, 666 A.2d 681 at 688-689 (Pa. Super. 1995); *Pennsylvania Rules of Appellate Procedure* 1925(b) and 302(a). Therefore, issues not raised in Defendant Sun's Concise Statement of Matters Complained of on Appeal will be deemed waived.

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Several issues raised by Defendant Sun in its Concise Statement of Matters Complained of on Appeal have been waived because they are "boilerplate assertions" concerning which no appropriate legal argument was provided in post-trial argument or brief. *Pennsylvania Rule of Civil Procedure* 227.1, *Frank v. Peckich*, 257 Pa. Super. 561, 391 A.2d 624 (1978). Such is likewise inappropriate in the appellate court. *Pennsylvania Rule of Appellate Procedure* 2119(a); *Nimick v. Shuty*, 440 Pa. Super. 87, 655 A.2d 132, 138 (1995).

The issues thus waived are numbers three, four, five and eight (in part) of Defendant Sun's Concise Statement of Matters Complained of on Appeal.

The Defendant Sun raises no issue concerning the jury's finding of liability in favor of the Plaintiffs, nor to the nature or extent of compensatory damages awarded to the Plaintiffs. Defendant Sun contends only that there was insufficient evidence to support an award of punitive damages, and that R & D should have been found liable.[3]

II. PUNITIVE DAMAGES

The jury's consideration of punitive damages was limited to the period of time which preceded the pipeline rupture March 4, 1992. The Court ruled that there was insufficient

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3. R & D was granted a directed verdict by the Court. (9/21/94 N.T. 8-9). R & D remained in the trial, however, for a determination of R & D's vicarious liability pursuant to the *Restatement (Second) of Torts*, Sections 416 and 427. Only the Defendant Sun has raised an appeal from the jury's verdict finding R & D not liable.

evidence to support the award of such damages following the oil spill. (9/130/94 N.T. 129). Sun contends that this Court erred in failing to grant a Judgment Notwithstanding the Verdict as to punitive damages. Although Sun argues that those damages were contrary to the weight of the evidence, such is not the legal standard. This motion involves merely a determination of whether there is sufficient evidence to support the verdict. *Scott v. Southwestern Mut. Fire Ass'n*, 436 Pa. Super. 242, 647 A.2d 587 (1994), alloc. den. 653 A.2d 1232 (1994).

A Judgment Notwithstanding the Verdict nay be entered only in a clear case where no two reasonable minds could fail to agree that the verdict was improper. *Pirozzi v. Penske Olde-Cadillac-GMC*, 413 Pa. Super. 308, 605 A.2d 373 (1992), alloc. den. 616 A.2d 985 (1992). The issue is whether there is sufficient competent evidence to support the verdict, granting the verdict winner the benefit of every reasonable inference from the evidence and rejecting all unfavorable testimony and inferences that may be drawn therefrom. *Spagnol Enterprises, Inc. v. Digital Equipment Corp.*, 390 Pa. Super. 372, 568 A.2d 948 (1990); *Robertson v. Atlantic Richfield Petroleum Company*, 371 Pa. Super. 49, 537 A.2d 814 (1987), alloc. den. 520 Pa. 590, 551 A.2d 216 (1988). The focus now becomes whether or not the Trial Court abused its discretion or committed an error of law affecting the outcome of the case. *Timbrook v. Foremost Ins. Co.*, 324 Pa. Super. 384, 471 A.2d 891 (1984).

The Pennsylvania Supreme Court adopted *Restatement (Second) of Torts*, Section 908(2), allowing the award of punitive damages for "conduct that is outrageous because of

the Defendant's evil motive or reckless indifference to the rights of others." *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984). "The act, or the failure to act, must be intentional, reckless or malicious." *Id.*, 485 A.2d at 748. See also: *Thomas v. American Cytoscope Makers Inc.*, 414 F.Supp. 255 (E.D. Pa. 1976). The purpose of punitive damages is, of course, to punish the Defendant's conduct and to deter similar behavior from others in the future. *Restatement (Second) of Torts*, Section 908(1). Mere negligence, or even gross negligence, is not a platform supporting sufficient culpability to warrant punitive damages.

Sun's contentions in defense of this action were that: Sun did [sic] know that Norcini's equipment had damaged the pipeline; Sun's employees did not have knowledge evincing a high degree of risk to Plaintiffs; and Sun took measures to insure pipeline integrity and safety. Sun argues, therefore, that there is not a sufficient evil motive, reckless disregard of Plaintiffs' safety, or outrageous conduct to support an award of punitive damages.

The pipeline in question was a "common carrier", transmitting various kinds of petroleum products, for example, in addition to the substance that was spilled as a result of this rupture, the same pipeline carries jet fuel, gasoline and kerosene. (9/16/94 F.T. 94, 106). Sun knew in June, 1989 of R & D's development and construction activity and its relation to the pipeline right-of-way. (9/19/94 N.T. 9-12; Trial Exhibits DS-24, 28, 30, 31). There was to be no use of the pipeline right-of-way by construction equipment except in one place designated for crossing. There were, during the period from June 30, 1989 through December,

1990, numerous reports and correspondence between Sun and R & D concerning the right-of-way policies and guidelines for the use of heavy equipment. Those documents included aerial reports of September 10, 1990 and November 5, 1990. (9/19/94 N.T. 119, 122-123; Trial Exhibit PB-11, PS-6). A special ramp was to be erected for the passage of heavy equipment over the pipeline, if necessary. (9/16/94 N.T. 153-154; 9/19/95 N.T. 15-25, 34-62; Trial Exhibits PS-6, PB 11-PB 16, DS-31-34). There is ample evidence to support the conclusion that Sun had knowledge of active ground clearing activities and the use of heavy equipment on both sides of the pipeline before the damage on November 16, 1990. Sun's agent inspected the construction area of the pipeline right-of-way but made no personal contact. (9/19/94 N.T. 119-120). He left a business card on the equipment to indicate his availability if there were questions by Norcini. (9/19/94 N.T. 119-120, 131). But there was no further effort to investigate the use of heavy equipment in the area of the pipeline.

An associate senior pipeline engineer for Sun expressed concern in an internal memorandum dated October 15, 1990, about six weeks after an aerial inspection report, about heavy equipment crossing the pipeline. (9/19/94 N.T. 45-46; Trial Exhibit PB-12). The same witness noted a "communication problem" between Sun and R & D. (9/19/94 N.T. 47; Trial Exhibit PB-12). Sun did nothing.

A senior pipeline engineer for Sun, Brian Melan, confirmed that a major cause of petroleum pipeline failure was force from outside the pipeline. (9/16/94 N.T. 74-75). A materials failure analyst, expert witness for Plaintiffs, Dr.

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Douglas Chisholm, concurring with Sun's engineer, testified that the largest single cause of pipeline failure in the United States was outside force due to excavation and that such is well known in the industry. (9/14/94 N.T. 14). A senior pipeline engineer for Sun at the time of the rupture testified that Sun, pursuant to its responsibilities for maintenance and corrosion control of the pipeline, had conducted both a caliper, and a smart, pig test.[4] (9/13/94 N.T. 143-155). The caliper pig test was conducted prior to the damage by Norcini's equipment operator to this pipeline, and the smart pig test was conducted following the damage and before the rupture. Linear locations along the pipeline are identified by weld numbers.[5] Sun's own engineers agreed that the rupture occurred in the upper portion of the pipeline in the same area where the "smart pig" test report had a year before indicated that the surface had been damaged. (9/13/94 N.T.

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4. A "*caliper pig*" is a piece of equipment that is sent through the pipeline to measure the diameter of the inner surface for the purpose of determining denting or gouging of the exterior surface.

A "*smart pig*", developed at the British Gas In-line Inspection Center, is a more sophisticated piece of equipment than the caliper pig but its primary purpose is to determine internal metal loss due to corrosion. Both "pig" tests, or mechanical flux tests, report variations in the internal diameter of the pipe, suggesting that part of the interior of the metal pipe has been lost due to corrosion. The "smart pig" test also identifies metal loss from outside force and indicates the general location of that damage. (9/16/94 N.T. 74).

5. The Notes of Testimony refer to "well 27440 through well 27450" and in fact the witness used the word "weld" not "well". (9/13/94 N.T. 152).

155; 9/16/94 N.T. 89, 93).[6] Plaintiffs' expert, Dr. Chisholm, testified that the area of the rupture in this pipeline had been shown on the computer tape reporting the smart pig test results to be relatively free of internal corrosion damage, but for the four "dings" evincing the damage. Further, he testified that the smart pig test report (including pages 263 and 264 which also evinced the "dings") would have taken only one day to review in its entirety had Sun's pipeline safety staff availed themselves of the opportunity so to do, which they did not. (9/13/94 N.T. 153-154; 9/14/94 N.T. 32-34, 41, 56). Sun's engineer, Mr. Maser, admitted that he had not read the British Gas report of the smart pig test prior to the rupture, but that he did have it in his possession no later than March of 1991, a year prior to the rupture. (9/13/94 N.T. 150-154).

Sun's engineers never attempted to determine whether or not there was pipe damage in the area of known construction. (9/16/94 N.T. 80-82).[7] Sun's engineers indicated that they would do nothing different today and remained unconcerned about the test reports. (9/13/94 N.T.

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6. Sun's engineer, Mr. Maser, acknowledged four spots of metal loss from this section of pipe had shown up on pages 262 and 263 of the British Gas Report and a computer tape from the "smart pig" test, with at least one of the spots showing a metal loss of fifty to seventy percent. British Gas developed and conducted the "smart pig" tests for Sun.

7. Sun's engineer testified that there was no investigation of the report indicating fifty to seventy percent metal loss to the section of the pipe where the rupture occurred and that all Sun would have had to do was to dig down approximately three feet. (9/16/94 N.T. 81-82).

154; 9/16/94 N.T. 65, 99). Sun's own policy was that where there was an indication of exterior damage to the integrity of a pipeline to the extent of ten percent, repairs were conducted because such gouging creates a stress concentration in the material, making it seven times more likely to fail than does, for example, corrosion. (9/16/94 N.T. 89-90).[8]

Plaintiffs' expert opined that Sun's conduct fell below the standard of care for prudent pipeline safety engineering in its "failure to properly and in a timely fashion evaluate in-house data available from the British Gas in-line inspection report to disclose the presence of wall thickness reductions in areas not significantly corroded . . . very probably due to gouging and denting," and in its failure to excavate and inspect the damaged area of the pipe and then to replace same. (9/14/94 N.T. 55-56). Another expert agreed with the foregoing opinion, concluding that Sun was further negligent in not investigating the damaged areas shown on the test report, especially in light of aerial reports evincing the activity of heavy equipment on both sides of the pipeline in the area where the damage occurred. (9/14/94 N.T. 140-41).

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8. Internal pressure within the pipeline from the petroleum product traveling through it at 1000 pounds per square inch and at high rates of speed push out radially towards the pipe's internal surface, creating what engineers term "hoop stress" which drives cracks in the surface apart. (9/16/94 N.T. 90-91). This "cold working" of the pipe's internal surface began here on November 16, 1990, the date the pipeline was damaged by Norcini's front end loader, according to Plaintiffs' metallurgical engineer. That is what ultimately caused the pipe rupture. (9/13/94 N.T. 206-212).

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It was evident that Sun's employees did not communicate between departments so as to obtain some collective understanding of all of the information that was available to it and, in fact, within the Sun company. It is apparent that the pipeline was damaged by the metal treads on Norcini's front end loader and inexorably this damage led to the inevitable pipe rupture which occurred in March of 1992. The risk of that rupture was substantially increased by that damage and Sun, although having available the "smart pig" test reports, failed to undertake any investigatory steps. Sun had within its hands not only the caliper and "smart pig" test reports, but also information about the construction, the equipment being used and aerial reports, all supplemented by a knowledge of the "common carrier" nature of this pipeline, years of experience and use of this pipeline. Sun's suggestion that the "smart pig" was not developed for the purpose of uncovering reparable damage to a pipeline is irrelevant, since it is clear that the tests very effectively identify damage and its location, thereby minimizing the expenditure necessary for repair and prevention. Sun certainly had the capability to accomplish those tasks.

Support for the requisite recklessness can be found in the evidence that: Sun assumed from the test reports that there was an acceptable level of corrosion undeserving of repair; Sun assumed there was no external damage based on the caliper pig test that had been conducted before the pipeline was damaged; Sun conducted no further caliper pig tests; Sun assumed the developers would follow Sun's procedures concerning crossing the right-of-way in spite of aerial reports; Sun visited the construction site when no equipment was operating and workers were absent without

follow up; and Sun did nothing to follow up the "smart pig" test reports indicating external damage to the pipeline in the area of the eventual rupture. Although Sun had the resources and talent to inspect, analyze and react to such problems, it did nothing as regard this damage. Only the serendipity that this line carried oil instead of gasoline prevented a broader catastrophe.

The law imposes a higher degree of care on companies dealing with gas and oil products because the potential for harm is so great should mishaps occur. *Karle v. National Fuel Gas Distribution Corp.*, 448 F. Supp. 753 (W.D. Pa. 1978); *Lerro v. Thomas Wynne, Inc.*, 451 Pa. 37, 301 A.2d 705 (1973); *Hemrock v. Peoples Natural Gas Co.*, 423 Pa. 259, 223 A.2d 687 (1966). The conduct of companies transporting such hazardous substances is evaluated in terms of the standard of knowledge of an expert in the field of underground pipes. *Karle v. National Fuel Gas Distribution Corp.*, supra, 448 F. Supp. at 759. The evidence here, considered in the light of the applicable law, supports the jury's conclusion that Sun intentionally and recklessly disregarded a known risk, or one so obvious that Sun must be deemed aware of it. This made the risk of the harm that followed highly probable. *Evans v. Philadelphia Transportation Co.*, 418 Pa. 567, 212 A.2d 440 (1965). Sun had knowledge of sufficient facts to cause a reasonable person to realize the existing danger of rupture sufficiently in advance of the event so as to provide a reasonable opportunity to undertake protective measures against the danger. *Fugagli v. Camasi*, 426 Pa. 1, 229 A.2d 735 (1967). *Restatement (Second) of Torts* Section 908, comment (d), states:

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> "if the conduct involves a high degree of chance that serious harm will result, that fact, that he knows or *has reason to know that others are within the range of its effect* is conclusive of recklessness."

The principle is adopted in *Focht v. Rabada*, 217 Pa. Super. 35, 268 A.2d 157, 159 (1970). Sun's failure to more regularly inspect, to be aware of and act upon the information available to it, and to more carefully guard against damage to the line, was a substantial factor in causing the rupture and certainly, in light of the risk of transporting such hazardous liquids, constitutes recklessness. The totality of the evidence is sufficient to support the jury's award of punitive damages.

Sun contends on appeal that there was error in allowing the issue of punitive damages to go to the jury, and in allowing evidence relevant thereto to be presented at various points in the trial.[9] The Court ruled during the liability phase that Defendants' objections in this regard were untimely pursuant to *Mazza v. Mattiaci*, 284 Pa. Super. 273, 425 A.2d 809 (1981). Such is not error, but in any event, as has hereinabove been discussed, the evidence supported allowing the jury to consider this issue. (9/16/94 N.T. 181-182).

Sun also contends that the Court's instructions were "directive" and not "questions".[10] Sun suggested in a

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9. Defendant Sun's Statement of Matters Complained of on Appeal, Paragraphs two and five.

10. Concise Statement of Matters Complained of on Appeal, paragraph 4.

boilerplate assertion in Paragraph Thirty of its Post Trial Motion that there was error in failing to place on the verdict slip an interrogatory that inquired as to whether Sun's conduct was outrageous along with the "directive" that the jury determine the amount awarded for punitive damages. As previously indicated, the matter was deemed waived. However, a fair reading of the Court's instructions will indicate that those instructions were complete regarding the legal issues, impartial and allowed the jury to decide those questions that justice under law demanded. Sun raised a concern of this nature during the damages portion of this bifurcated trial. (9/30/94 N.T. 246-247). However, the record demonstrates no objection by Sun to the verdict slip in this respect but merely an inquiry from Sun regarding its wording as to punitive damages. There was no preservation of such an issue for post-trial litigation, nor has Sun cited to any exception in the record as required. *Pennsylvania Rule of Appellate Procedure* 302(b). Also waived for precisely the same reason was a boilerplate contention found in Paragraph Thirty-one of Sun's Post-Trial Motion and paragraph 5 of the Concise Statement of Matters Complained of on Appeal, alleging error in the purported refusal to allow the issue of punitive damages to be considered during deliberation over liability. (See 9/20/94 N.T. 126-128; 9/21/94 N.T. 10, 194-246; 9/30/94 N.T. 246-250).

Finally, Sun raises an objection contending the Court instructed the jury that it could award punitive damages to "send a message."[11] The matter has been neither argued nor briefed nor supported by citation to the trial transcript. There

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11. Sun's Concise Statement of Matters Complained of on Appeal, paragraph three.

is no such statement nor is there any objection from Sun in this regard to the Court's instructions either at the beginning of the trial, during the trial, or at the conclusion of the trial as to liability or as to damages. (9/30/94 N.T. 237-241; 10/3/94 N.T. 19-21). A fair review of the instructions, in any event, will indicate that they were in keeping with the law as it relates to the evidence in the case at bar. *Feld v. Merriam*, supra; *Pierce v. Penman*, 357 Pa. Super. 225, 237, 515 A.2d 948, 954 (1986) alloc. den., 515 Pa. 608, 529 A.2d 1082 (1987); *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 347, 499 A.2d 637, 642 (1985), alloc. den., 514 Pa. 639, 523 A.2d 346 (1987) (quoting with approval Section 908(2) of the *Restatement*, which is the basis for the charge given).

It is for the foregoing reasons that Sun's Motion for Judgment Notwithstanding the Verdict as to Plaintiffs' claims for Punitive Damages was denied.

III. PECULIAR — RISK DOCTRINE

Sun seeks a judgment non obstante veredicto or a new trial concerning the liability of R & D. Sun's arguments in this regard are founded upon *Restatement (Second) of Torts*, Sections 416 and 427.[12]

The law governing review of a motion for judgment non obstante veredicto has been hereinabove previously

12. See Concise Statement of Matters Complained of on Appeal, paragraphs six, seven and eight. It has hereinabove been noted that the Defendant waived the second half of paragraph eight.

discussed.[13] A motion for new trial requires the Court to consider all competent evidence and determine whether the verdict was against the clear weight thereof, or whether there was clear error of law controlling the outcome of this case or a palpable abuse of discretion by the Trial Court. *Klyman v. Southeastern Pennsylvania Transportation Authority*, 331 Pa. Super. 172, 480 A.2d 299 (1984). Any abuse of discretion must be demonstrated by clear and convincing evidence, and the Trial Court will be upheld on any valid ground. *Ludmer v. Nernberg*, 433 Pa. Super. 316, 640 A.2d 939 (1994), alloc. den. 664 A.2d 542 (1995); *Stevenson v. General Motors Corporation*, 513 Pa. 411, 521 A.2d 413 (1987). An abuse of discretion is not merely an error of judgment, but can exist where the law is overridden or misapplied, or where the Court's exercise of judgment is manifestly unreasonable, or where such exercise is the result of partiality, prejudice, bias or ill-will. *Spitzer v. Tucker*, 404 Pa. Super. 539, 591 A.2d 723 (1991), alloc. den. 607 A.2d 255 (1992). A new trial will be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice. *Palange v. City of Philadelphia, Law Department*, 433 Pa. Super. 373, 640 A.2d 1305 (1994), alloc. den. 666 A.2d 1057 (1995).

Defendant R & D had moved for summary judgment, but since there were disputed material issues of fact, it was denied. A summary judgment would be inappropriate in that context. *Pennsylvania Rule of Civil Procedure* 1035(b); *Briggs v. Erie Ins. Grp.*, 406 Pa. Super. 560, 594 A.2d 761 (1991); *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 205 (1991). It is beyond cavil that denial of R & D's Motion on that

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13. See pp. 6-7, supra.

basis could not have established the law of the case as Sun claims!

A. Weight and Sufficiency of the Evidence

Restatement (Second) of Torts, Sections 416 and 417 provide an exception to the general rule that an employer is not liable for the negligence of an independent contractor. Sun contends that pursuant to those sections, R & D should have been found liable.[14]

Sun argues that the Court should have found as a matter of law that the excavation and grading work called for in the contract between R & D and Norcini involved an activity likely to create a peculiar risk and a special danger because it took place near the pipeline. The law, however, provides that a special danger or peculiar risk must emanate from the work itself and must be specifically identifiable or foreseeable in advance so as to be within the contemplation of the parties to the contract so that precautions can be implemented to prevent it. *Ortiz v. Ra-El Development Corp.*, 365 Pa. Super. 48, 528 A.2d 1355 (1987), alloc. den. 517 Pa. 608, 536 A.2d 1332 (1987). There is no aspect of the contract between Norcini and R & D that necessitates work on the pipeline right-of-way. There is no special danger or peculiar risk in excavating or grading, in and of itself.

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14. R & D was granted a directed verdict as to contentions arising under *Restatement (Second) of Torts*, Section 414, concerning direct negligence as to control of the manner of Norcini's work. *Marshall v. Southeastern Pennsylvania Transportation Authority*, 587 F. Supp. 258 (E.D. Pa. 1984), aff'd. 760 F.2d 259 (3rd Cir. 1985). That decision is not an issue in this appeal.

That leaves only the question as to whether or not such can arise because the construction work is being done near or adjacent to a forty-foot right-of-way which contains a petroleum pipeline. This Court ruled that any risk or danger involving the pipeline was not inherent in the work of excavation and grading. The risk to which this exception in the law applies must not only be identifiable at or before entering the contract, but the risk also must arise from dangers inherent to and peculiar to performance under this contract. Such a peculiar risk must be beyond the normal, ordinary, customary or expected risks arising from a contract's performance, here excavation and grading. *Ortiz v. Ra-El Development Corp.*, supra; *Marshall v. Southeastern Pennsylvania Transportation Authority*, supra; *Sharkey v. Airco, Inc.*, 522 F. Supp. 646, aff'd. 688 F.2d 818 (3rd Cir. 1982); *Restatement (Second) of Torts*, Sections 416, 426, 427. The risk is measured by the nature of the work, not the nearness of potential harm. That this construction work was near a pipeline right-of-way in no way presents any particular risk or danger, at least certainly not as a matter of law. The equipment operator's careless conduct, contrary to specific instructions, is hardly a foreseeable risk in entering into such a contract as a matter of law. It was for the jury to determine the terms of the contract between R & D and Norcini and to discern the foreseeability of the equipment operator's conduct in evaluating the liability of R & D. It is proper to allow such questions of mixed fact and law to the jury. *Lorah v. Luppold Roofing Company, Inc.*, 424 Pa. Super. 439, 622 A.2d 1383 (1993); *McDonough v. United States Steel Corp.*, 228 Pa. Super. 268, 324 A.2d 542 (1974).

An employer of an independent contractor in Pennsylvania is not liable for harm caused to another by

negligence of that independent contractor or its employees. *Hader v. Coplay Cement Co.*, 410 Pa. 139, 189 A.2d 271 (1963); *Ortiz v. Ra-El Development Corp.*, supra. An employer may, however, be held liable for the negligence of its independent contractor where the work to be performed by the independent contractor involves a special danger or a peculiar risk. *Edwards v. Franklin & Marshall College*, 444 Pa. Super. 1, 663 A.2d 187 (1995); *Lorah v. Luppold Roofing Company, Inc.*, supra; *Steiner v. Bell of Pennsylvania*, 426 Pa. Super. 84, 626 A.2d 584 (1993); *Restatement (Second) of Torts*, Sections 416 and 427.[15] Pennsylvania has adopted *Restatement (Second) of Torts* Sections 416 and 427. *Philadelphia Electric Company v. James Julian, Inc.*, 425 Pa. 217, 228 A.2d 669 (1967).

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15. Section 416 of the *Restatement (Second) of Torts* provides:

> "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

Section 427 of the *Restatement (Second) of Torts* provides:

> "One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or

(Cont'd)

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Sun relies upon *Philadelphia Electric Company v. James Julian, Inc.*, supra, but that case is clearly distinguishable from the one at bar. There, the Court found the independent contractor liable for negligently failing to warn a subcontractor that in pile driving a fence post, it could go directly into a high pressure underground gas main within the confines of the contract work area. The issue of the employer's vicarious liability pursuant to Sections 416 and 427 was not reached in that case, nor was the pipeline identified as the "peculiar risk" inherent in the work being done. The risk there was the danger of breaking the gas main as a result of pile driving a fence post too far through the earth above the main in the absence of warning and precautions designed to prevent damage to the gas main. Norcini's employee was not working anywhere near the pipeline or its right-of-way and traversed the pipeline some three hundred yards from the designated crossing and in full view of signs marking the pipeline right-of-way. (9/19/94 N.T. 27, 81). Here, there was no reason to enter the pipeline right-of-way and both Norcini and his employee had been warned against doing so. The area where Norcini's equipment crossed the pipeline was not part of the construction project.

(Cont'd)

> has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

The terms "peculiar risk" and "special danger" contained in the foregoing sections have been used interchangeably by the courts. *Ortiz v. RA-EL Development Corp.*, supra.

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Judge Beck in *Ortiz v. Ra-El Development Corp.*, supra, wrote:

> "The rationale underlying liability is that an employer of the independent contractor ought to anticipate a heightened level of risk where the work is specially dangerous or peculiarly risky. It is reasonable for the employer to take precautions or cause the independent contractor to take precautions to minimize the possibility of injury to others. . . . [A] special danger or peculiar risk exists where:
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> 1) the risk is foreseeable to the employer of the independent contractor at the time the contract is executed, i.e., a reasonable person, in the position of the employer, would foresee the risk and recognize the need to take special measures; and
>
> 2) the risk is different from the usual and ordinary risk associated with the general type of work done, i.e. the specific project or task chosen by the employer involves circumstances that are substantially out-of-the-ordinary." *Id.*, 528 A.2d at 1357-1358.

Thus defined are the terms "peculiar risk" and "special danger." The risk of harm must arise from the peculiar or inherent nature of the task or the manner of its performance, and not from the ordinary negligence which might attend the performance of any particular task. *Mentzer v. Ognibene*, 408 Pa. Super. 578, 597 A.2d 604, 610 (1991), alloc. den.

530 Pa. 660, 609 A.2d 168 (1992). Where the employer of a general contractor is to be held vicariously liable for negligence, the conduct must be intimately connected with the work authorized and reasonably likely from its nature. *Edwards v. Franklin & Marshall College*, supra; *McDonough v. United States Steel Corp.*, supra.

Since a "peculiar risk" or "special danger" must be a risk that is recognizable in advance and contemplated by the employer of the subcontractor at the time the contract is entered, it must not be a risk created solely by a subcontractor's collateral negligence, or negligence consisting of improper performance of the work contracted for.[16] *Edwards v. Franklin & Marshall College*, supra; *Mentzer v. Ognibene*, supra. The risk must involve some particular hazard resulting from the nature of the work being performed which calls for special precautions. *Restatement (Second) of Torts* Section 416, comment (b). The law here is not referring to a general anticipation that if an employee or independent contractor is negligent, some harm will be caused to third persons. Routine precautions by a reasonably careful contractor are not the goal of these principles. The focus of the law in this regard is upon an independent contractor being asked to undertake work which in and of itself presents special risks. The employer in such circumstance may not divest itself from responsibility as relates to those special risks caused by the work for which the independent contractor is hired. The peculiarity of this special risk relates to a special recognizable danger arising out of the work itself. *Restatement (Second) of Torts* Section 416, comment (b).

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16. *Restatement (Second) of Torts* Section 426 defines negligence collateral to the risk of doing the work.

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Judge Bechtle's Opinion in *Marshall v. Southeastern Pennsylvania Transportation Authority*, supra, is instructive in this regard. Concluding that Sections 416 and 427, together with comment (b) to section 413,[17] must be read together, the court states that a "peculiar risk" is found to exist where:

> "1. the risk is recognizable or foreseeable in advance and contemplated by the employer at the time the contract was formed; and
>
> 2. the risk is different from the ordinary risks attendant to the type of work being done, arising out of either the place where the work is performed or the existence of some other unusual factor; and
>
> 3. a reasonable man familiar with the type of work being done would recognize the necessity of taking special precautions in view of this risk; and
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> 4. the risk was not created by the contractor's collateral negligence." *Id.*, 587 F. Supp. at 264.

Merely because construction work involves some risk of harm does not mean that the risk is necessarily peculiar

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17. Pennsylvania has adopted comment (b) of Section 413, *Restatement (Second) of Torts*, as law. *Hargrove v. Frommeyer & Co.*, 229 Pa. Super. 298, 323 A.2d 300 (1974). The focus is not exclusively upon the nature of the work, but rather upon the nexus between the work and the alleged negligence in determining the peculiarity of the risks. *Sharkey v. Airco, Inc.*, supra.

within the *Restatement* terms. "[P]eculiar risk situations should be viewed narrowly, as any other exception to the general rule is viewed." *Marshall v. Southeastern Pennsylvania Transportation Authority*, supra, 587 F.Supp. 258 at 264.[18]

It is clear that this jury found Norcini through its driver to be negligent. There is no contest as to that. It is also undisputed that the breadth of this pipeline right-of-way was uniformly forty feet, with the pipeline approximately three feet deep along the center of this right-of-way. (Trial Exhibit RD-1). There was no need for heavy equipment to cross the pipeline right-of-way at any location other than at the prepared crossing on Shepherd Lane. There was no requirement of any work to be done on the right-of-way. Indeed, all construction activity, including the two drainage basins, were clearly outside of the right-of-way and there was not even the hint of an inference that any need existed for heavy equipment to encroach upon the right-of-way or cross the pipeline. (9/20/94 N.T. 28, 38-41, 87-88, 104, 109-110, 113). Norcini's employee had in fact been ordered not to cross the right-of-way at any point except the Shepherd Lane crossing some three hundred yards away which had been prepared for such use. (9/20/94 N.T. 104-105, 112). The point of rupture was approximately three hundred yards from the approved crossing and in an area where no work was proposed to be done. (9/19/94 N.T. 27, 81). The operator of this heavy equipment had years of experience and was

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18. The Pennsylvania Superior Court quoted with approval the foregoing statement from *Marshall* in *Ortiz v. Ra-El Development Corp.*, supra, 528 A.2d at 1359, also citing the *Restatement (Second) of Torts* Section 413 Comment (b).

employed by Norcini since 1984. (9/13/94 N.T. 109-110). The operator knew the job limitations, the instructions not to cross the right-of-way at the point where he got stuck, and made no effort to obtain permission to so cross. (9/13/94 N.T. 113-114, 121). He knew he should not drive the equipment over the pipeline. (9/13/94 N.T. 126; 9/20/94 N.T. 15). He also knew where the right-of-way was and the existence of the pipeline. (9/13/94 N.T. 123-124, 126; 9/20/94 N.T. 14-15).

The evidence presented at this trial, some of which has been reviewed, when laid against the defense evidence that Sun knew nothing of the damage and had no reason to suspect it, clearly raised issues of material facts which precluded this Court from deciding as a matter of law the issue concerning the existence of a peculiar risk in the case at bar. Where there are mixed questions of law and fact, the question of peculiar risk is for the jury to resolve. *Ortiz v. Ra-El Development Corp.*, supra; *Edwards v. Franklin & Marshall College*, supra; *Lorah v. Luppold Roofing Company, Inc.*, supra; *Steiner v. Bell of Pennsylvania*, supra; *Restatement (Second) of Torts*, Sections 413(b), 416 and 427; *Philadelphia Electric Company v. James Julian, Inc.*, supra; *Mentzer v. Ognibene*, supra. The jury concluded that the damage to the pipeline caused by the front end loader in this case was not a foreseeable peculiar risk or special danger contemplated by the parties to the subcontract and that the incident constituted "collateral" or "casual" negligence on the part of Norcini. Thus, the jury found in favor of R & D. The evidence hereinabove reviewed provides an ample basis for the jury's conclusions in this regard. The evidence also supports the jury's conclusion that Norcini's failure to use

ordinary care in controlling the worksite, and not the presence of the pipeline, was what caused a risk of harm to Plaintiffs. *Sharkey v. Airco, Inc.*, supra; *Marshall v. Southeastern Pennsylvania Transportation Authority*, supra.

The law concerning the grant of Judgment Non Obstante Veredicto, or in the alternative, a new trial, has hereinabove been reviewed.[19] It is for the foregoing reasons that the Court determined that the relief requested was not appropriate, that the jury's verdict was amply grounded in the evidence, and that the law was correctly communicated to the jury. *Exner v. Gangewere*, 397 Pa. 58, 152 A.2d 458 (1959); *Wenrick v. Schloemann-Siemag Aktiengesellschaft, et al*, 523 Pa. 1, 564 A.2d 1244 (1989); *Timbrook v. Foremost Ins. Co.*, supra; *Read v. Shu*, 419 Pa. Super. 227, 615 A.2d 109 (1992); *Spagnol Enterprises, Inc. v. Digital Equipment Corp.*, supra.

B. Jury Interrogatories

Defendant Sun contends that the Court erred in submitting interrogatories to this jury concerning liability of R & D pursuant to *Restatement (Second) of Torts* Section 416 and 427.[20] Question 5 on the Verdict Slip inquired as to whether or not the jury found R & D liable generally. Question 5A inquired:

"DO YOU FIND THAT DEFENDANT, JOSEPH NORCINI & SONS, INC., FAILED TO

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19. See pp. 6-7, supra.

20. See *Verdict Slip* dated September 22, 1994, questions 5, 5A and 5B.

Appendix C

EXERCISE REASONABLE CARE TO TAKE SPECIAL PRECAUTIONS WHERE YOU HAVE FOUND THAT DEFENDANT, REWIS & DAMBLY CONSTRUCTION, INC., SHOULD HAVE RECOGNIZED THAT THE WORK IS LIKELY TO CREATE A PECULIAR RISK DURING ITS PROGRESS?"

Question 5B inquired:

"DO YOU FIND THAT DEFENDANT, JOSEPH NORCINI & SONS, INC., FAILED TO TAKE REASONABLE PRECAUTIONS AS AN INDEPENDENT CONTRACTOR DOING WORK INVOLVING A SPECIAL DANGER TO OTHERS OF WHICH DEFENDANT, REWIS & DAMBLY CONSTRUCTION, INC., KNEW OR HAD REASON TO KNOW IS INHERENT IN OR NORMAL TO THE WORK, OR WHICH DEFENDANT, REWIS & DAMBLY CONSTRUCTION, INC., CONTEMPLATED OR HAD REASON TO CONTEMPLATE WHEN MAKING THE CONTRACT?"

The Defendant Sun agrees that both questions correctly reflect the law, but argues that Questions 5A and 5B should have preceded Question 5. Although Sun suggests that the Court failed to use the language it proposed, a fair reading of the record evinces that such language was in fact included within the Court's instructions to the jury. (9/21/94 N.T. 173-181). The language of these interrogatories correctly reflects the law of this Commonwealth. *Restatement (Second)*

of Torts Sections 416 and 427; Pennsylvania Bar Institute's Suggested Standard Civil Jury Instruction 4.08; Defendant Sun's proffered points for charge, numbers 13 and 14; *Lilly v. Johns-Manville Corporation*, 408 Pa. Super. 83, 596 A.2d 203 (1991), alloc. den. 607 A.2d 254 (1992); *Elder v. Orluck*, 334 Pa. Super. 329, 483 A.2d 474 (1984), aff'd. 511 Pa. 402, 515 A.2d 517 (1986).

This jury was instructed that if the collateral negligence of Norcini caused the damage and consequent rupture, then R & D could not be found liable. (9/21/94 N.T. 173-181; 9/22/94 N.T. 4-9). If the jury found that R & D was not liable upon that basis, then there would be no need to reach Questions 5A and 5B on the Verdict Slip.

The logic of the interrogatories allowed the jury to determine R & D's liability, and then, if found to be liable, to indicate the particular rationale therefor pursuant to *Restatement* Sections 416 and 427. Sun has failed to direct our attention to any legal principle supporting its contention, nor is this Court able to discern any prejudice whatsoever from this record.

The jury unanimously found that R & D was free from liability. There is nothing in this record to suggest, as does the Defendant, that even if a rearrangement of the questions was appropriate, the jury would have concluded differently.

Despite a suggestion that such is an issue on appeal, Defendant Sun's Post-Trial Motions raised no issue or objection to the Court's jury instructions in this regard. At a sidebar conference held to discuss objections or exceptions

to the charge, Defendant Sun did suggest a renumbering of the interrogatories from the straight numerical order previously decided upon, and this was done. (9/21/94 N.T. 222-226). However, following that sidebar and while the Court was in the process of concluding its instructions to the jury, the Defendant Sun interrupted and requested a sidebar, whereat counsel then raised a concern about the order of these interrogatories, but again no specific exception or objection was interposed, and the Court thereafter concluded its instructions to the jury. (9/21/94 N.T. 230-234, 237-238). The record thus evinces neither objection nor exception by Sun to the wording or order of the interrogatories nor to the portion of the Court's instructions explaining the Verdict Slip to the jury. The same status continued through the Court's reinstruction of the jury concerning the peculiar risk doctrine. (9/22/94 N.T. 4-9, 12). This is not to say that Sun did not raise questions, but that no objection was either entered or preserved.

Specific exception must be made during a trial to a jury instruction to preserve that issue for post-trial motions and appeal. *Pennsylvania Rule of Civil Procedure* 227.1(b)(1); *Pennsylvania Rule of Appellate Procedure* 302(b); *Fillmore v. Hill*, 445 Pa. Super. 324, 665 A.2d 514 (1995); *Boyle v. Steiman*, 429 Pa. Super. 1, 10, 631 A.2d 1025, 1030 (1993), alloc. denied, 538 Pa. 663, 649 A.2d 666 (1994); *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 258, 322 A.2d 114, 116 (1974); *Randt v. Abex Corp.*, 671 A.2d 228 (Pa. Super. 1996). Appellate courts have held that they will not consider a claim which has not been called to the Trial Court's attention at or reasonably near the time of an alleged error so as to allow an opportunity to correct the matter.

Noecker v. Johns-Manville Corp., 355 Pa. Super. 463, 471, 513 A.2d 1014, 1018 (1986); *Dilliplaine v. Lehigh Valley Trust Company*, supra, 322 A.2d at 116; see also *Takes v. Metropolitan Edison Co.*, 440 Pa. Super. 101, 655 A.2d 138, 141 (1995) (en banc) (*Dilliplaine* waiver rule inspired in part by effort to motivate trial counsel to be diligent and assist court in preventing error at trial stage where it could be corrected). This appellate issue should thus be deemed waived.

Further, Sun has failed to support this particular contention with appropriately developed legal argument, and with citation to legal authority, and for this reason, as well, the contention should be deemed waived. *Frank v. Peckich*, supra; *Commonwealth ex rel. Robinson v. Robinson*, 505 Pa. 226, 478 A.2d 800 (1984); *Nimick v. Shuty*, supra; *Smith v. Penbridge Associates, Inc.*, 440 Pa. Super. 410, 655 A.2d 1015 (1995); *Hercules v. Jones*, 415 Pa. Super. 449, 609 A.2d 837 (1992).

Still further, a Court's instructions to the jury will be upheld if they adequately and accurately reflect the law and explain how it applies to the case at hand. *Robinson v. B.F. Goodrich Tire Co.*, 444 Pa. Super. 640 at 643, 664 A. 2d 616 (1995), alloc. den. 670 A.2d 142 (1996); *Brill v. Systems Resources, Inc.*, 405 Pa. Super. 603, 606, 592 A.2d 1377, 1378 (1991), quoting *Commonwealth v. Person*, 345 Pa. Super. 341, 345, 498 A.2d 432, 434 (1985). Sun must establish that there was an instruction fundamentally in error which might have been responsible for the verdict. *Sedlitsky v. Pareso*, 425 Pa. Super. 327, 332, 625 A.2d 71, 74 (1993). The Trial Court is not obligated to read proffered points for

charge or to use wording suggested by counsel so long as the jury is advised as to what the law is and how it applies to the case at hand. *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., et alia*, 398 Pa. Super. 264, 580 A.2d 1341, at 1344 (1990), alloc. den. 594 A.2d 659 (1991); *Brandimarti v. Caterpillar Tractor Co.*, 364 Pa. Super. 26, 527 A.2d 134 (1987), alloc. den., 527 Pa. 629, 539 A.2d 810 (1988); *Hrivnak v. Perrone*, 472 Pa. 348, 372 A.2d 730 (1977). Instructions are to be limited to the evidence before the jury and not involve extraneous or unrelated principles of law. *Smith v. Celotex Corporation*, 387 Pa. Super. 340, 564 A.2d 209 (1989); *Perigo v. Deegan*, 288 Pa. Super. 93, 431 A.2d 303 (1981). Points already covered need not be covered again. *Ligon v. Middletown Area School District*, 136 Pa.Cwth. 566, 584 A.3d 376 (1990).

Defendant Sun has presented no argument as to how it might have been prejudiced by these questions or even if Question 5 on the Verdict Slip had been eliminated, how the answers would have changed, or how Question 5 could not have been answered negatively if either Question 5A or 5B had been answered affirmatively. Allowing Questions 5A and 5B to specify in greater detail the answer to Question 5 was a matter that the Court, in its discretion, after discussion with counsel, believed appropriate to assist the parties in understanding the verdict that would be rendered. The jury instructions in this regard, when read as a whole, fairly explain the doctrine of "peculiar risk" and the related interrogatories as well, thereby helping the jury to focus its deliberations upon those issues and the principles that were raised by the Court's instructions. No one suggests that the issues concerning the peculiar risk doctrine were not properly part of this trial and instruction.

It is for the foregoing reasons that this Court declined to grant Defendant Sun the relief it requested as to its claims against R & D.

This Court, therefore, denied Sun's Post-Trial Motions.

BY THE COURT:

s/ Clement J. McGovern, Jr.
CLEMENT J. McGOVERN, JR., J.

APPENDIX D — ORDER OF THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA DATED MAY 12, 1995 AND FILED MAY 15, 1995

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION — LAW

NO. 92-3598

STEVEN SEYMOUR and GERALDINE SEYMOUR, h/w, et al.

v.

SUN COMPANY, INC., SUN PIPE LINE and SUN REFINING AND MARKETING COMPANY

NO. 92-6131

SUN PIPE LINE COMPANY

v.

REWIS & DAMBLY CONSTRUCTION, INC. and REWIS & DAMBLY DEVELOPMENT, INC.

Defendant

and

JOSEPH NORCINI & SONS, INC.

Additional Defendant

Appendix D

NO. 93-16345

JOSEPH BATCHELDER and JANA BATCHELDER

v.

SUN PIPE LINE COMPANY

NO. 93-18844

NANCIE GROVE

v.

SUN COMPANY, INC., ET AL.

NO. 94-29

JOSEPH BATCHELDER and JANA BATCHELDER

v.

ATLANTIC PIPELINE CORP., ET AL.

* * *

ORDER

AND NOW, this 12th day of May, 1995, Defendants' Sun Company, Inc., Sun Pipe Line Company, Sun Refining and Marketing Company and Atlantic Pipeline Corp. Motion for Post-Trial Relief is DENIED.

BY THE COURT:

s/ Clement J. McGovern, Jr.
CLEMENT J. McGOVERN, JR., J.

APPENDIX E — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DENYING APPLICATION FOR REARGUMENT DATED JANUARY 28, 2000

[J-213-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 55, 56 M.D. Appeal Docket 1999

STEVEN SEYMOUR AND GERALDINE SEYMOUR, H/W, ET AL

v.

SUN COMPANY, INC., ET AL

APPEAL OF: STEVEN AND GERALDINE SEYMOUR, ET AL (AT 55MDA99)

APPEAL OF: JOSEPH AND JANA BATCHELDER (AT 56MDA99)

Appellees' Application for Reargument

ORDER

PER CURIAM:

AND NOW, this 28th day of January, 2000, Appellees' Application for Reargument is DENIED.

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

No. 99-1741

IN THE

Supreme Court of the United States

SUNOCO, INC., SUN PIPE LINE COMPANY
and ATLANTIC PIPELINE CORP.,

Petitioners,

v.

STEVEN SEYMOUR, GERALDINE SEYMOUR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
PENNSYLVANIA SUPREME COURT, MIDDLE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondents not listed in the caption are: Emma Nelson, Allen H. Nelson, Jennifer Coll, Mary Grochowski, Chester Grochowski, Nancie S. Grove, Sharon Monzo, David Monzo, Carol Anne Denaro, Charles Denaro, Deborah Poppert, Thomas J. Poppert, Helen Read, Harold Read, Bonnie Smith, Craig E. Smith, A. Thomas Stewart, Vera Williams, Robert Williams, Joseph Batchelder and Jana Batchelder. Mr. McFadden is Counsel for all Respondents, with the exception of Joseph and Jana Batchelder, who are separately represented.

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Rule:

United States Supreme Court Rule 10 1

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari, filed by Sunoco, Inc., Sun Pipe Line Company and Atlantic Pipeline Corp. ["Petitioners"] should not be granted as: (1) Petitioners' claim of due process violation was not before the Pennsylvania Supreme Court and was not properly preserved for this Court's review; (2) Pennsylvania law ensures that punitive damage awards are reasonable and satisfy the requirements of due process; and (3) Petitioners' articulated reasons for granting the writ of certiorari do not invoke due process rights.

I.

PETITIONERS' CLAIM OF DUE PROCESS VIOLATION WAS NOT BEFORE THE PENNSYLVANIA SUPREME COURT AND, THUS, WAS NOT PROPERLY PRESERVED FOR THIS COURT'S REVIEW.

Under Rule 10 of the Rules of the United States Supreme Court, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." The Rule then lists three considerations. The first consideration reviews decisions of a United States court of appeals. The second and third considerations seek review of a decision by a state court on an "important question of federal law." Respondents contend that none of these considerations are met in this case.

Although Petitioners present two questions for review, the basic argument advanced is that the Pennsylvania Supreme Court "deprived petitioners of the due process guaranteed by the Fourteenth Amendment." Petition for a

Writ of Certiorari, at 6. Although due process is an "important question of federal law", it was *not* an issue under review by the Pennsylvania Supreme Court. Following the Superior Court's finding that there was insufficient evidence to support the jury's $1,000,000 punitive damages award, Respondents filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, presenting this sole question for review:

> Whether the Superior Court violated its standard and scope of review and misapplied the Supreme Court's holding with respect to the imposition of punitive damages in deciding that Respondent Sun Pipe Line Company's actions did not rise to the level of reckless indifference. (Respondents' Petition for Allowance of Appeal, at 2).

It was this question that was certified for review by the Supreme Court and this question that was briefed and argued by the parties. At no time during this process did Petitioners raise the issue of due process.[1] In fact, Petitioners did not "mention" this issue until *after* the Supreme Court handed down its decision and Petitioners filed for Reargument. In their Petition for Reargument, Petitioners cite four "Points of Law or Fact Overlooked or Misapprehended by the Court." The fourth point states that the Supreme Court's Order "does

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1. Although Petitioners cite to pages in their briefs to the Superior and Supreme Courts where due process was discussed (Petition for a Writ of Certiorari, at 5-6), examination of these briefs reveals that the references where part of a quote from this Court's case of *Honda Motor Co., Inc. v. Oberg*, 114 S. Ct. 2331 (1994) where due process concerns are mentioned. There was no argument in these briefs that the imposition of punitive damages was a violation of Petitioners' due process rights.

not indicate the factual basis for its decision, nor does it indicate that the Court applied the stringent standards needed under Pennsylvania law and under Due Process requirements for punitive damages, and its reference to *Adamski*[2] suggests that this Court did not sufficiently address these Due Process concerns." (Petitioners' Application for Reargument, at iv).

Although arguably raised as a "Point" for the Supreme Court's consideration, Petitioners failed to brief their "due process concerns" in their Application for Reargument, thus waiving the issue.[3] *Estate of Lakatosh*, 441 Pa. Super. 133, 656 A.2d 1378 (1995) (argument portion of appellate brief must contain a pertinent discussion of the particular point raised along with discussion and citation of pertinent authorities). In a similar case, *Adams v. Robertson*, 520 U.S. 83 (1997), this Court held that petitioners failed to establish that they properly presented a due process challenge to Alabama's Supreme Court. Dismissing a writ of certiorari as improvidently granted, this Court wrote:

> With "very rare exceptions", we have adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state that rendered the decision we have been asked to review . . . (citations omitted)

---

2. *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996).

3. Again, the only reference to due process considerations in the Petition for Reargument was the same quote from the *Honda* case, used by Petitioners in their briefs to the Superior and Supreme Court. *See* n.1.

> When the highest court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here."

520 U.S. at 85-86. (citations omitted).

Petitioners have not met their burden of showing that their due process challenge was properly presented to the Pennsylvania Supreme Court. Therefore, this "important question of federal law" — violation of Petitioners' due process rights — was not under consideration by the Pennsylvania Supreme Court and should not be accepted for review by this Court.

II.

PENNSYLVANIA LAW ENSURES THAT PUNITIVE DAMAGE AWARDS ARE REASONABLE AND SATISFY DUE PROCESS

Petitioners have asked this Court to intervene in this matter because "the Pennsylvania Supreme Court deprives petitioner and other interstate and intrastate citizens sued for punitive damages in Pennsylvania of the most fundamental due process checks against the unwarranted imposition of punitive damages." Petition for a Writ of Certiorari, at 7. Petitioners suggest that the Pennsylvania Supreme Court has "eroded the traditional safeguards against baseless punitive damages awards" and "treats the jury's punitive damages verdict as merely the resolution of a pure

question of fact that was essentially unreviewable . . ." Petition for a Writ of Certiorari, at 8, 10.

In support of their contention, Petitioners cite to *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989), in which the Court held that punitive damages do not have to bear a reasonable relationship to compensatory damages awarded. However, contrary to Petitioners' position, this does not end a Pennsylvania Court's review of a punitive damages verdict, as a reasonable relationship must still exist between the nature of the cause of action underlying the compensatory award and the decision to grant punitive damages. 555 A.2d at 803-04. As this Court stated in *BMW of North America v. Gore*, 517 U.S. 559 (1996):

> Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, states necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the state's legitimate interests in punishment and deterrence. (citations omitted).

Again, contrary to Petitioners' position, the Pennsylvania Supreme Court is not out of step with this Court's holdings in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). In *Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d

890, *alloc. denied*, 670 A.2d 142 (1995) the Court was faced with a challenge to the excessiveness of a punitive damages verdict, and in its opinion provides a comprehensive analysis on the law governing punitive damages in Pennsylvania.

> The Pennsylvania Supreme Court has never espoused any rule antithetical to the position of the United States Supreme Court's decision in *Honda Motor Co., Ltd. v. Oberg*. Pennsylvania law is quite clear that the courts of this Commonwealth have the power to review a jury's award of punitive damages for excessiveness. Although the standard of measure requires no comparison between the value of the compensatory damages and the total of the punitive damages, Pennsylvania courts must determine whether the punitive damage award advances the dual goals of punishment and deterrence and is disproportionate in character of the tortious act, to the harm suffered by the plaintiff, and to the wealth of the defendant. *Kirkbride v. Lisbon Contractors, Inc.*, 521 at 103-104, 555 A.2d at 803-04. Our courts are fully empowered to remit punitive damages whenever the award is shocking to the court's sense of justice. Id. The evaluation in such cases is subject to appellate review under an abuse of discretion standard. *Id.* 656 A.2d at 927.
>
> The Pennsylvania standard [applied in *Kirkbride*] clearly established by our Supreme Court appears to fully comport with the Alabama standard approved by the United States Supreme Court [in *Pacific Mutual Life Insurance Co. v. Haslip*]

> as satisfying the requirements of due process. See *W.W. Management and Development Company, Inc. v. Scottsdale Insurance Co.*, 769 F.Supp. 178, 180-84 (E.D.Pa. 1991) (Pennsylvania law makes considerable effort to ensure that punitive damage awards are reasonable and satisfy due process; the Pennsylvania system "kicks in" before the jury considers the matter and provides supervision throughout the appeal process); *Loughman v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1114, 1124 (W.D.Pa. 1990), *aff'd in part, vacated on other grounds in part sub nom. Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594 (3d Cir. 1991), *cert. denied*, 504 U.S. 955, 112 S.Ct. 2300, 119 L.Ed.2d 224 (1992) (Pennsylvania law protects against excess punitive damages by providing adequate guidelines for juror when calculating amount of award and permitting court to remit damages to more reasonable amount if punitive damages are so disproportionate as to shock the court's sense of justice when considering character of act, nature and extent of harm, and wealth of defendant). We therefore find no conflict between the law of Pennsylvania concerning punitive damages and the Fourteenth Amendment. 656 A.2d at 928.

Additionally, it should be noted that many of the United States Supreme Court cases cited by Petitioners in support of their claim involve punitive damages verdicts where the challenge was the *excessiveness* of the verdict. Although these cases are helpful in understanding this Court's rulings on the issue of punitive damages, they are not applicable to the present case, as Petitioners have never raised this issue. Thus, Petitioners' invocation of due process rights is not warranted.

> *Only* when an award can fairly be categorized as "grossly excessive" in relation to these interests [state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. (emphasis added). *BMW of North America v. Gore*, 517 U.S. 559 (1996).[4]

III.

PETITIONERS' ARTICULATED REASONS FOR GRANTING THE WRIT DO NOT INVOKE DUE PROCESS RIGHTS

Petitioners articulate four reasons in support of their argument that they were deprived of due process.

1. The Supreme Court's order provides no analysis of the facts and does not reflect an independent determination that the facts warrant the imposition of punitive damages.

2. As the sole basis for its decision, the Court referred to its *Adamski* decision.

---

4. Petitioners use of this same reference in their Petition (*see* p. 7) is misplaced and has been taken out of context to fit their argument. Petitioners argue that "Pennsylvania thus eliminated . . . one of the essential tests established by your Honorable Court in *BMW of North America, Inc. v. Gore*, for the judicial determination as to when punitive damages awards '*enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.*' " Petitioners fail to cite the entire sentence, quoted above, which states that the Due Process Clause can *only* be invoked when there is an award that is "grossly excessive." There is no contention by Petitioners that the awards were excessive.

3. The resolution of whether the petitioners could have or should have been alerted to possible mechanical damage does not resolve the legal question as to whether the facts establish the requisite pre-accident state of mind to justify the imposition of punitive damages.

4. The facts do not show that petitioner acted with the state of mind that would justify the jury's punitive damages award.

Petition for a Writ of Certiorari, at 13-14.

However, for the reasons set forth below, none of these reasons invoke a deprivation of due process rights

A. The Pennsylvania Supreme Court Is Under No Obligation To Indicate a Factual Basis For Its Decisions.

In their first point, Petitioners argue that their due process rights were violated because the Supreme Court's Order did not contain a factual basis for its decision. Petitioners do not cite, nor can they cite, to any authority requiring the Pennsylvania Supreme Court to articulate the basis for its decision. Petitioners seem to argue that, since the Order does not set forth a written detailed factual analysis, that the Court never went through any analysis in making its decision. However, Petitioners offer no factual or legal support for this implausible statement.

B. The *Adamski* Case Is Directly On Point With the Issue That Was Before the Pennsylvania Supreme Court.

Petitioners' second point, that the Pennsylvania Supreme Court's use of the *Adamski* decision demonstrates a violation of due process rights is misplaced. Petitioners argue that the *Adamski* case is distinguishable from the present case because it did not involve the imposition of punitive damages. While *Adamski* did not involve the issue of punitive damages, the case is directly on point with the issue presented to the Pennsylvania Supreme Court — whether the Superior Court violated its standard and scope of review in deciding that Petitioners' actions did not rise to the level of reckless indifference.

The *Adamski* case involved an insurance coverage dispute that centered on the issue of whether Miller had the permission of his mother (the policyholder) to use her automobile. Following a bench trial, the trial court found that Miller had the mother's implied consent to use the vehicle. The trial court denied the insurance company's request for judgment n.o.v. On appeal, the Superior Court reversed, finding that the trial court had abused its discretion in deciding that implied consent existed. Adamski appealed to the Supreme Court, arguing that the Superior Court failed to review the evidence under the correct legal standard. The Supreme Court agreed, finding that the evidence found by the trial court was credible and amply supported the trial court's verdict. In its decision, the Supreme Court reiterated the proper standard of review:

> The proper standard of review of an appellate court when examining the lower court's refusal to grant a judgment n.o.v. is whether, when

> reading the record in a light most favorable to the verdict winner and granting that party every favorable inference therefrom, there was sufficient competent evidence to sustain the verdict. Questions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence. Absent an abuse of discretion, the trial court's determination will not be disturbed. 681 A.2d at 173.

Thus, the *Adamski* case is directly on point with the present case since Respondents contended that the trial court found substantial evidence to support the punitive damages award and the Superior Court substituted its own judgment in violation of its standard and scope of review.[5]

C. The Record In This Case Clearly Supported the Jury's Award of Punitive Damages.

In its third and fourth points, Petitioners seek another opportunity to rehash the facts in this case. Respondents take issue with the statement that the "historical facts of this case, when accurately recounted and tested under the standard for punitive damages, are largely *undisputed*." Petition for a Writ of Certiorari, at 13 (emphasis added). Petitioners' version of the facts presented in its Concise Statement of the Case, pp. 1-6, ignores much of the key evidence that was disputed during the trial.

---

5. Additionally, the Superior Court in the present case found no abuse of discretion on the part of the Trial Court. Thus, the Trial Court's determination that Sun's actions rose to the level of recklessness should not be disturbed. *See Adamski*, 681 A.2d at 173.

At trial, Respondents presented evidence that Petitioners were in possession of critical facts from the British Gas Report a year before the spill occurred but disregarded this critical information. Petitioners continued to operate the pipeline under pressure for over one (1) year despite this knowledge. Petitioners did not have sufficient controls in place so as to identify the loss of product in the pipeline and provide for immediate shutdown of the pipeline. The pipeline at Point Breeze and Boot Pump Station had old controls which did not detect a loss of product at the time of the failure and provide for an automatic shutdown so as to minimize the loss of product.

The Trial Court, in finding that the totality of the evidence was sufficient to support the jury's award of punitive damages stated:

> It is apparent that the pipeline was damaged by the metal treads of Norcini's front-end loader and inexorably this damage led to the inevitable pipe rupture which occurred in March of 1992. The risk of that rupture was substantially increased by that damage and Sun, although having available the "smart pig" test reports, failed to undertake any investigatory steps. Sun had within its hands not only the caliper and "smart pig" reports, but also information about the construction, the equipment being used and aerial reports, all supplemented by a knowledge of the "common carrier" nature of this pipeline, years of experience and use of this pipeline. Sun's suggestion that the "smart pig" was not developed for the purpose of uncovering reparable damage to a pipeline is irrelevant, since it is clear that the

> tests very effectively identify damage and its location, thereby minimizing the expenditure necessary for repair and prevention. Sun certainly had the capability to accomplish those tasks.
>
> Support for the requisite recklessness can be found in the evidence that: Sun assumed from the test reports that there was an acceptable level of corrosion undeserving of repair; Sun assumed there was no external damage based on the caliper pig test that had been conduct before the pipeline was damaged; Sun conducted no further caliper pig tests; Sun assumed the developers would follow Sun's procedures concerning crossing the right-of-way in spite of aerial reports; Sun visited the construction site when no equipment was operating and workers were absent without follow up; and Sun did nothing to follow up the "smart pig" test reports indicating external damage to the pipeline in the area of the eventual rupture. Although Sun had the resources and talent to inspect, analyze and react to such problems, it did nothing as regard this damage. Only the serendipity that this line carried oil instead of gasoline prevented a broader catastrophe. (Petition for Writ of Certiorari, Appendix C, at 35a-36a).

Petitioners also argue that the facts "viewed from petitioners' *pre-accident* perspective, do not show that, before the accident occurred, petitioner knew or even had reason to know of the hidden damage inflicted by the subcontractor's secretive trespass onto the pipe line, and that petitioner consciously or deliberately chose to allow the pipe line to rupture." Petition for Writ of Certiorari, at 15 (emphasis added).

However, Respondents presented evidence at trial that Sun knew in September 1989 that development and construction activity was proposed for the area surrounding the pipeline. From December 1989 through November 1990, there were numerous Sun interoffice reports and correspondence stating that Sun was concerned with heavy equipment crossing the pipeline in the area of construction of the new development. Sun's December 6, 1989 correspondence expressed concern about the possibility of heavy equipment crossing the existing pipeline. Sun knew that there were problems with communications between Rewis and Dambly and its contractor. Sun's concern continued and was heightened nine months later when an October 15, 1990 internal correspondence expressed Sun's recognition of the problem and the "need to reiterate our concern with heavy equipment crossing our lines during construction." A November 5, 1990 Sun report states "backhoe east of ROW [right-of-way]" and "dozer crossing ROW (reported before)." Two weeks later, the front-end loader damaged the pipeline. On December 7, 1990, Sun knew that there was active ground clearing and heavy equipment in the pipeline area.

The Honorable Sydney Hoffman, in his dissent of the Superior Court panel's judgment vacating the punitive damages award, summarized the evidence as follows:

> I believe that there is sufficient competent evidence to uphold the award of punitive damages. After receiving reports that heavy equipment had crossed the pipeline at the Shepard Lane site, an associate pipeline engineer expressed concern in a memorandum that the pipeline may have been damaged. The company

> then received test results that revealed extensive metal loss in the area of Shepard Lane, the same area where the pipeline engineer was concerned about damage from heavy machinery. Moreover, the pipeline carried petroleum products that presented an enormous risk to the property and the population in the areas surrounding the pipeline. Furthermore, an expert testified that, given the information Sun possessed about the pipeline at the Shepard Lane site, Sun should have investigated whether the pipeline needed repair. Despite the obvious warning signs that the pipeline suffered damage at the Shepard Lane site, Sun did not bother to send engineers to the Shepard Lane site to inspect the section of pipeline. Accordingly, I believe that Sun had reason to know of a high degree of risk by failing to take affirmative steps to investigate and remedy the pipeline. Certainly, viewing the evidence in the light most favorable to appellees and considering the risk involved in transporting hazardous materials, the jury's award of punitive damages was proper. Petition for Writ of Certiorari, Appendix B, at 19a).

Thus, Petitioners' claims of largely undisputed facts and lack of pre-accident evidence is unfounded.

CONCLUSION

For the aforementioned reasons, Respondents respectfully request that the Honorable Court deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

No. 99-1741

In The

Supreme Court of the United States

SUNOCO, INC., SUN PIPE LINE COMPANY and ATLANTIC PIPELINE CORP.,

Petitioners,

v.

STEVEN SEYMOUR, GERALDINE SEYMOUR, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court, Middle District

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether the petitioners have failed to preserve for this Court's review any issue of denial of due process by failing to raise said issue properly before the Supreme Court of Pennsylvania.

Whether the procedures for appellate review of punitive damage awards, as well as the decision of the Supreme Court of Pennsylvania in this case reinstating a jury's award of punitive damages, after full briefing and argument, and under the standards applicable under the law of the Commonwealth of Pennsylvania, meet the requirements of due process of law under the United States Constitution.

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Appendix C – Excerpted Brief of Appellants (petitioners herein) filed in the Superior Court of Pennsylvania C1

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Writ of Certiorari for two reasons. First, petitioners have failed to preserve any issue implicating an important federal question for review by this Court. Second, the issues presented by petitioners are not of constitutional dimension, but rather represent a contrivance of inapposite constitutional principles by which petitioners seek to obtain this Court's review of a question of sufficiency of evidence.

I.

PETITIONERS HAVE FAILED TO PRESERVE ANY ISSUE FOR THIS COURT'S REVIEW

Under Rule 10 of the Rules of the Supreme Court of United States, certiorari will be granted "only for compelling reasons," and, in the case of a petition seeking review of the decision of a state court of last resort, when the state court has decided "an important federal question" in a way that conflicts with the decision of another state court of last resort or with a United States court of appeals, or when the state court has decided an "important question of federal law" that has not been settled by this Court, or in a way that conflicts with the decisions of this Court.

Petitioners claim that a decision of the Supreme Court of Pennsylvania reinstating an award of punitive damages has deprived them of due process. However, no constitutional claim was ever addressed to the Supreme Court of Pennsylvania for its review. In the state court proceedings, at the trial level and on appeal, petitioners

attack on the jury's award of punitive damages was limited to the claim that the evidence was insufficient to support the verdict under Pennsylvania law which petitioners claimed requires a heightened standard of review of punitive damage awards. Thus, the issue before the Superior Court of Pennsylvania was a claim of insufficiency of evidence, and after the reversal, the issue upon which the Supreme Court of Pennsylvania permitted discretionary review was whether the Superior Court "violated its standard and scope of review and misapplied the [Pennsylvania] Supreme Court's holding with respect to the imposition of punitive damages. . . . " Respondents' Petition for Allowance of Appeal at 2.

Petitioners claim to have asserted an issue of constitutional dimension for the first time in their Petition for Reargument of the Judgment and Order of the Supreme Court of Pennsylvania, dated November 19, 1999. Petitioners cite as a Point of Law or Fact Overlooked or Misapprehended by the Court that the Supreme Court's Order does not "indicate that the Court applied the stringent standards needed under Pennsylvania law and under Due Process requirements for punitive damages, and its reference to *Adamski* [*v. Miller*, 681 A.2d 171 (Pa. 1996)] suggests that this Court did not sufficiently address these Due Process concerns." *See* Appendix A Excerpted Petition for Reargument filed with the Supreme Court of Pennsylvania at iv (A2).

The issue, as framed by petitioners in their Petition for Reargument, is no more than a criticism of the Order of the Supreme Court of Pennsylvania, rather than a claim that the decision itself deprived petitioners of due

process of law. Petitioners' claim, as reflected in the Petition for Reargument, does not focus on the merits of the decision, but on the manner in which Supreme Court delivered the decision – *i.e.*, a *per curiam* judgment order reversing the Superior Court and reinstating the jury's verdict on punitive damages. The precise nature of the issue cannot be ascertained, however, inasmuch as petitioners failed to brief any deprivation of due process issue in their Petition for Reargument. The petitioners' failure to brief the due process issue constitutes a waiver of the issue under Pennsylvania law. *Madison Construction Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999) (mention of an issue, particularly a significant issue, in a footnote does not preserve issue for review); *Denton v. Silver Stream Nursing And Rehab. Ctr.*, 739 A.2d 571, 575 (Pa. Super. 1999) (court will not consider merits of constitutional argument not argued in brief).

This Court's own precedent militates against review of petitioners' claims. Petitioner is obligated to demonstrate that the state court "had a fair opportunity to address the federal question that is sought to be presented. . . . " *Webb v. Webb*, 451 U.S. 493, 501 (1981). Petitioners' burden before this Court is to demonstrate that it presented the particular claim with "fair precision and in due time." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980). *See also Adams v. Robertson*, 520 U.S. 83 (1997) (reference to federal constitutional issues in state court briefs insufficient to preserve issue for review by Supreme Court of the United States).

Significantly, contrary to petitioners' representation to this Court, no due process argument was presented to the Supreme Court of Pennsylvania on its initial review.

See Appendix B Brief for Appellees (Petitioners herein) filed in the Supreme Court of Pennsylvania at 23-24 (B2-B3). Petitioners' sole mention of due process in the body of their Petition for Reargument is within the confines of a quotation from this Court's opinion in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), which quote was used to support a belatedly-raised claim that *Pennsylvania law* requires heightened scrutiny of punitive damage awards.[1] *See* Appendix A Excerpted Petition for Reargument filed in the Supreme Court of Pennsylvania at 4 (A4). The same quote was used for a similar purpose in a footnote in the Petitioner's Brief for Appellant filed with the Superior Court of Pennsylvania. *See* Appendix C Excerpted Brief for Appellants (Petitioners herein) filed in the Superior Court of Pennsylvania at 35-36 n.5 (C3-C4). Thus, as was the case in *Adams*, petitioners have failed to preserve any issue for this Court's review.

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[1] Petitioners' argument that Pennsylvania law requires heightened scrutiny by appellate courts was in the context of an assertion that Pennsylvania law ought to require clear and convincing evidence to sustain a punitive damage award. The citation to this Court's decision in *Honda Motor Company* actually undermines petitioners' argument. As this Court noted the case did not involve the question of what standard of review is constitutionally required. Nonetheless this Court cited standards of review that focus on gross excessiveness, passion or prejudice or against the great weight of the evidence as being compliant with this Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *Honda Motor Company*, 512 U.S. at 432 n.10.

II.

THE PENNSYLVANIA APPELLATE PROCESS OF REVIEW OF PUNITIVE DAMAGE AWARDS MEETS DUE PROCESS STANDARDS

The gist of petitioners' argument, presented for the first time in this Court, is that the appellate procedures for review of punitive damage awards in Pennsylvania fail to meet constitutional standards of due process. To support this premise, petitioners conceal the true nature of the review of punitive damage claims by the Pennsylvania appellate courts generally, and in this case, and misconstrue decisions of this Court to present an illogical and misleading argument.

Appellate review of punitive damage awards under Pennsylvania law is well defined. Under Pennsylvania law, punitive damages *must* be based on conduct that is outrageous, *i.e.*, conduct which is malicious, wanton, reckless, willful or oppressive. *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984). The court looks to the defendant's act, together with all the circumstances including the motive of the wrongdoers and the relations between the parties. *Feld*, 485 A.2d at 748. The determination of whether a person's actions rise to outrageous conduct lies within the sound discretion of the fact finder, but can be reversed by an appellate court where that discretion has been abused." *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991). Moreover, Pennsylvania law provides for a new trial or for remittitur based on the excessiveness of a punitive damage award. The scope of relief is within the discretion of the trial court, but is subject to review by the appellate courts where there is an abuse of discretion or where an error of law has been

committed. *Sprague v. Walter*, 656 A.2d 890, 924 (Pa. Super. 1995).

Pennsylvania law regarding appellate review of punitive damage awards is in marked contrast to Oregon law which was deemed constitutionally deficient by this Court in *Honda Motor Company v. Oberg*. In *Honda Motor Company*, this Court reversed a decision of the Oregon Supreme Court upholding a jury award of punitive damages against a claim of excessiveness. The principal defect in the Oregon scheme of review of punitive damage awards was the absence of any review based on the excessiveness of the award itself. *Honda Motor Company*, 512 U.S. at 426-27.[2] Pennsylvania law, however, provides the remedy of remittitur, or even, new trial, when the excessiveness of a punitive damage verdict suggests the jury was guided by partiality, prejudice, mistake or corruption, *Sprague*, 656 A.2d at 924, or passion or prejudice, *DiSalle v. PG Publishing Co.*, 544 A.2d 1345, 1375 (Pa. Super. 1988).

Petitioners' argument that the Pennsylvania Supreme Court improperly relied on *Adamski v. Miller*, highlights the true nature of petitioners' claims and its request to this Court. Indeed, *Adamski* holds that questions of credibility and conflicts in the evidence are matters for the trial court and an appellate court is not to reweigh the

---

[2] Petitioners cite a number of other decisions of this Court, all of which relate to due process challenges to punitive damage awards based on the excessiveness of the punitive damages. No claim of excessiveness was raised either in the state court or in the Petition for Writ of Certiorari, and therefore, these cases are inapposite.

evidence. The Pennsylvania Supreme Court in the present case reversed the decision of the Superior Court for precisely that reason – *i.e.*, the Superior Court reweighed the evidence in order to reach a different result than the trial court. Now petitioners ask this Court to reweigh the decision of the Pennsylvania Supreme Court and substitute this Court's judgment on the evidence presented. *See* Petition for Writ of Certiorari at 13-14. Were this Court to grant review in cases of this nature, this Court's docket would be laden with hundreds of thousands of cases where evidentiary disputes are dressed up in constitutional clothing.

CONCLUSION

For the reasons stated herein, respondents, Joseph and Jana Batchelder, respectfully request this Honorable Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

55 M.D. APPEAL DOCKET 1999
56 M.D. APPEAL DOCKET 1999

STEVEN SEYMOUR AND GERALDINE SEYMOUR, et al.
v.
SUN COMPANY, INC. et al.

SUN PIPE LINE COMPANY
v.
REWIS & DAMBLY CONSTRUCTION, INC., et al.

JOSEPH BATCHELDER and JANA BATCHELDER
v.
SUN PIPE LINE COMPANY

NANCIE GROVE
v.
SUN COMPANY, INC., et al.

JOSEPH BATCHELDER AND JANA BATCHELDER
v.
ATLANTIC PIPELINE CORPORATION, et al.

APPLICATION FOR REARGUMENT OF APPELLEES SUN PIPE LINE COMPANY, SUN COMPANY, INC., SUN REFINING AND MARKETING COMPANY AND ATLANTIC PIPELINE CORPORATION

Application of Sun Pipe Line Company, Sun Company, Inc., Sun Refining and Marketing Company and Atlantic Pipeline Corporation for Reargument of the Judgment of the Supreme Court Entered on November 19, 1999 Reversing the Order of Superior Court entered June 1, 1998 at 2295

PHL 95, and Reinstating the Award of Punitive Damages by Order of the Court of Common Pleas of Delaware County, Civil Division, entered May 22, 1995 at Nos. 92-3598, 92-6131, 93-16345, 93-18844, 94-29

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II. SPECIFICATION WITH PARTICULARITY OF THE POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

In its Order entered on November 19, 1999 remanding the case to the trial court for reinstatement of the award of punitive damages, this Honorable Court overlooked or misapprehended the following points of law or fact:

1. The Superior Court did not substitute its judgment for that of the jury in reversing the trial court's imposition of punitive damages against Appellees, but rather ruled that the trial court erred in submitting the issue of punitive damages to the jury for consideration because, as a matter of law, Appellees conduct did not reach the level of outrageousness or reckless indifference

required for the imposition of punitive damages in the Commonwealth of Pennsylvania.

2. The decision of the trial court, the arguments of the plaintiffs, and the dissenting opinion of the Superior Court were based on the wrong legal standard and facts not established by the evidence.

3. The decision in *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996), cited by this Honorable Court in reversing the decision of the Superior Court, is distinguishable from this case.

4. This Honorable Court's Order does not indicate the factual basis for its decision, nor does it indicate that the Court applied the stringent standards needed under Pennsylvania law and under Due Process requirements for punitive damages, and its reference to *Adamski* suggests that this Court did not sufficiently address these Due Process concerns.

* * *

C. Punitive Damage Awards Routinely Undergo Heightened Scrutiny

This Honorable Court has long recognized the need for judicial safeguards to protect against the imposition of punitive damages where they are unwarranted. *G.J.D.*, 552 Pa. at 177, 713 A.2d at 1131. Therefore, punitive damage verdicts undergo heightened scrutiny to ensure that there is "clear and convincing" evidence to fulfill the exacting "reckless indifference" standard. *See Martin*, 508 Pa. at 169, 494 A.2d at 1096; *Banas*, 348 Pa. Super. at 470, 502 A.2d at 640. The United States Supreme Court has

recognized the danger which punitive damage awards present:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. . . .

Honda Motor Co., Inc. v. Obert, 114 S. Ct. 2331, 2340-41 (1994). Accordingly, "the clear and convincing standard of proof, is an important check against unwarranted imposition of punitive damages. . . . " *Id. Honda Motor Co.* also cautions that a state's

> abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis. [citations omitted] . . . When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process.

Id. at 2339-40.

Such "heightened scrutiny" has routinely been applied by this Honorable Court. For instance, in *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), this Honorable

Court vacated a punitive damage award because, as a matter of law, the trial Court erred in

* * *

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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55 M.D. APPEAL DOCKET 1999
56 M.D. APPEAL DOCKET 1999

STEVEN SEYMOUR AND GERALDINE SEYMOUR, et al.
Appellant
v.
SUN COMPANY, INC. et al.
Appellees

JOSEPH BATCHELDER and JANA BATCHELDER
Appellants
v.
SUN PIPE LINE COMPANY
Appellee

NANCIE GROVE
Appellant
v.
SUN COMPANY, INC., et al.
Appellees

BRIEF FOR APPELLEES SUN PIPE LINE COMPANY, SUN COMPANY, INC., SUN REFINING AND MARKETING COMPANY AND ATLANTIC PIPELINE CORPORATION

Appeal From The June 1, 1998 Order of the Superior Court of Pennsylvania, No. 2295 PHIL 95, Vacating the Award of Punitive Damages, and the Per Curium Order Dated August 6, 1998, denying Reargument.

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role in this as well. (R. 474a.) Dr. Deegan conceded that in his final analysis the pipeline leak was caused by the damage done by Norcini's front end loader and that the leak would not have happened "but for the damage". (R. 527a.)

In his investigation after the leak and criticism of Sun Pipe Line's analysis of the British Gas "smart pig" test, plaintiffs' pipeline expert, Douglas Chisholm, opined:

> In my opinion, Sun possessed information which indicates a wall loss not due to corrosion but probably, very probably, due to mechanical gouging and denting. . . .

(R. 614a.)

On cross examination, Dr. Chisholm testified that the people at Sun Pipe Line interpreted the British Gas test as best they could (R. 619a-620a; 627a); that they correctly identified many areas along the relevant portions of the pipeline for repair but that they missed one (R. 620a); that his criticism comes after the fact as a "Monday morning

quarterback" (R. 620a); that the British Gas test is completely voluntary "over and above the obligations of a pipeline" (R. 630a-631a); and, that the test was run voluntarily in Sun Pipe Line's effort to make the recently purchased Atlantic pipelines safer (632a).

SUMMARY OF ARGUMENT

There was no evidence in the record before the trial court to support a finding that Sun Pipe Line acted outrageously or with conscious disregard for the safety of others in the maintenance, operation and testing of its pipeline which ruptured in Edgmont Township, Delaware County in March of 1992. The trial court erred by viewing the facts from the retrospective hindsight advocated by the plaintiffs' experts rather than from the contemporaneous perspective of the Sun Pipe Line employees. The Superior Court, in contrast, properly viewed the facts of this case in accordance with the mandates of this Honorable Court, and held that the evidence on the record failed to establish that the Sun Pipe Line employees appreciated the risk created by Norcini's concealed negligence but nevertheless acted in flagrant disregard of the hidden danger presented thereby.

* * *

APPENDIX C

SUPERIOR COURT OF PENNSYLVANIA

NO. 2295 PHL 95

SEYMOUR, et al.
Appellees
v.
SUN COMPANY, INC., et al.
Appellants

SUN PIPE LINE COMPANY,
Appellant
v.
REWIS & DAMBLY CONSTRUCTION, INC., et al.,
Appellees

JOSEPH BATCHELDER and JANA BATCHELDER,
Appellees
v.
SUN PIPE LINE COMPANY,
Appellant

NANCIE GROVE,
Appellee
v.
SUN COMPANY, INC., et al.,
Appellants

JOSEPH and JANA BATCHELDER,
Appellees
v.
ATLANTIC PIPELINE CORP., et al.,
Appellants

BRIEF FOR APPELLANTS
SUN COMPANY, INC.
SUN PIPE LINE COMPANY
SUN REFINING AND MARKETING COMPANY
AND ATLANTIC PIPELINE CORP.

APPEAL FROM the JUDGMENTS AND ORDERS OF THE COURT OF COMMON PLEAS OF DELAWARE COUNTY CIVIL ACTION NOS. 92-3598; 92-6131; 93-16345; 93-18844; 94-29 DATED: MAY 12, 1995, MAY 24, 1995 AND MAY 25, 1995

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* * *

facts from the retrospective hindsight advocated by the plaintiffs' experts rather than from the contemporaneous perspective of the Sun Pipe Line employees.

According to the mandate of the Supreme Court, the state of mind of the actor is vital. When viewed in accordance with the mandates of the Supreme Court, the facts of this case fail to establish that the Sun Pipe Line employees appreciated the risk created by Norcini's negligence and nevertheless acted in flagrant disregard of the danger presented thereby.

Also by adopting plaintiffs' approach to punitive damages, the lower court failed to recognize that the public policy for punitive damages would be disserved in this case. Punitive damages are only imposed for outrageous conduct; those acts done with an evil motive and a

reckless indifference to the interests of others. By imposing this penalty on Sun Pipe Line, the court will in effect punish companies for conducting unrequired tests and deter voluntary proactive pipeline testing designed and intended to protect the public and the environment.

Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984), and *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088 (1985) require that this court grant defendants' motion for judgment notwithstanding the verdict on the jury's punitive damages award because plaintiffs' evidence fails as a matter of law to warrant the imposition of punitive damages.[5]

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[5] Punitive damage verdicts undergo heightened scrutiny, *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985) (even in the rare instances in which they are justified, punitive damages subject to strict judicial controls).

An essential part of this strict review of punitive damages verdicts is the "clear and convincing" quality of the evidence required to fulfill the exacting "reckless indifference" standard at issue in this case. As the United States Supreme Court recently recognized in *Honda Motor Co., Inc. v. Oberg*, 114 S. Ct. 2331, 2340-2341 (1994), "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences . . . ", and " . . . the clear and convincing standard of proof, is an important check against unwarranted imposition of punitive damages . . . ".

Honda Motor Co., Inc., also causations that a state's " . . . abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first-Due Process cases, traditional practice

In *Feld*, where the jury had awarded punitive damages in connection with the brutalities inflicted upon tenants of the defendant landlord, whose security system the jury found wanting, our Supreme Court vacated the punitive damages award and ordered a new trial. Holding that the trial Court erred in submitting the punitive damages claim to the jury, the Court declared, 506 Pa. at 395-396, 485 A.2d at 747-748:

> This Court has embraced the guideline of Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." See *Chambers v. Montgomery*, 411 Pa. 339, 192A.2d 355 (1963). Punitive damages must be based on conduct which is " 'malicious,' 'wanton,' 'reckless,' 'willful,' or 'oppressive' . . . " *Id.* at 344-
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provides a touchstone for constitutional analysis. [citations omitted] . . . when the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process", 114 S.Ct. at 2339-2340.